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United States
Court of Appeals
for the Ninth Circuit.

STATE OF WASHINGTON, a Sovereign State, and SMITH
TROY, Attorney General of the State of Washington,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

STATE OF WASHINGTON, a Sovereign State, and SMITH
TROY, Attorney General of the State of Washington,
Appellees.

Transcript of Record

Appeals from the United States District Court,
Western District of Washington
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorney General of the State of Washington.

HARRY L. PARR, ESQ.,

Assistant Attorney General,

Temple of Justice,

Olympia, Washington.

Attorneys for Plaintiffs.

J. CHARLES DENNIS, ESQ.

United States Attorney,

GUY A. B. DOVELL, ESQ.,

Assistant United States Attorney,

324 Federal Building,

Tacoma, Washington,

Attorneys for Defendant.

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING LEAVE TO FILE
SECOND AMENDED COMPLAINT

This matter coming regularly on to be heard upon the Motion of the Plaintiff for leave to file a 2nd Amended complaint and the Plaintiff being represented by Smith Troy, Attorney General, and Harry L. Parr and Charles R. Nelson, Assistants Attorneys General of the State of Washington; and J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Assistant United States Attorney, and the matter being properly presented to the Court and the Court being fully advised in the premises,

It Is Hereby Ordered that leave be, and leave is hereby, granted to file the 2nd Amended Complaint, in this cause.

Done in open court this 11th day of December,
A.D., 1950.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Approved as to form:

/s/ GUY A. B. DOVELL,
Assistant U. S Attorney.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come now the plaintiffs and for cause of action
against the defendants allege:

I.

That the State of Washington is a sovereign state
and one of the states of the United States; that the
Department of Labor and Industries is an admin-
istrative agency of the State of Washington cre-
ated by an act of the State Legislature, whose duty
is the collection of the debts to be used exclusively
for the payment of compensation to injured work-
men who are injured in the course of their em-
ployment within the State of Washington; that
Smith Troy is the duly elected, qualified and acting
Attorney General of the State of Washington and
charged by law with the duty of collecting all

monies due or to become due the State of Washington or any of its administrative agencies.

II.

That this cause is brought to this court which, by virtue of Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S. 2177) and specifically under sections 401-422 of said act, same being entitled the Federal Tort Claims Act (28 U.S.C.A., section 931), has jurisdiction to try said cause, the jurisdiction of this court being founded upon said act of Congress last mentioned; that the army vehicle hereinafter referred to was one owned by the United States of America and operated by army personnel as the agent of the United States of America and under direct supervision of the Secretary of War.

III.

That under the laws of the State of Washington, there is no statute of limitations as against debts due the State of Washington, Department of Labor and Industries, in its sovereign capacity; that the State of Washington administers workmen's compensation in its sovereign capacity and when an injured workman elects to take from the State of Washington and assigns his claim to the state, no statute of limitations runs against such claim.

IV.

That on the 9th day of March, 1945, Eldon Parke was engaged in employment within the State of Washington covered by the Workmen's Compensa-

tion Act; that on said day Eldon Parke was working within the scope of his employment for his employer, the State of Washington (Washington State Patrol Division) proceeding south on Washington Street which is an arterial street in the City of Vancouver, County of Clark, State of Washington, enroute to the Washington Patrol Office on First and Washington Streets in said city and was traveling between fifteen (15) and twenty (20) miles per hour and in all respects complying with the law, when at the intersection of Washington Street and Tenth Street in the heart of the business and congested district of the City of Vancouver, a United States Army fire truck, operated by Clarence D. Nelson, Corporal, in the United States Army, traveling on the left hand side of Tenth Street, and in utter disregard for the safety of all persons using the public highway, passed through the stop sign at Tenth and Washington Streets, at an unreasonable speed of from thirty (30) to forty-five (45) miles per hour, although such truck was not on an emergency trip to a fire but was proceeding to its usual and customary station at the City of Vancouver fire department's station to act as a stand-by truck, when said fire truck struck the car being operated by the said Eldon Parke, he, the said Eldon Parke being at that time more than half way across the intersection of Tenth and Washington Streets, said fire truck striking Eldon Parke's car in the rear end and spinning said car completely around and throwing said car off the highway and throwing the said Eldon Parke out of

the car and into a used car lot some twenty (20) feet distant; the said driver of the fire truck not looking where he was going and not stopping to offer aid nor assistance but continuing in his reckless manner on his journey, and all without fault on the part of Eldon Parke and thereby injuring the said Eldon Parke by causing multiple contusions and abrasions and a double fracture of the right femur and by reason of said injury the Department of Labor and Industries of the State of Washington paid out of the accident and medical aid funds for said injury of the said Eldon Parke the sum of \$3,671.56 which was a reasonable, proper and legal amount and sum to be paid for this injury. The said sum as aforesaid was in the sum of \$1,638.96 to the Northern Permenente Foundation, (Northern Permente Hospital) for medical attention and hospitalization of Eldon Parke and which sum was a reasonable, necessary and legal sum; and \$1,090.35 time loss to Eldon Parke for his time away from his duties which is a legal, necessary and reasonable sum; and permanent partial disability of \$685.00 paid to Eldon Parke which is a reasonable, necessary and legal sum; and \$15.00 to Dr. Kimberly; \$158.75 to Dr. Lucas; and \$83.50 for ambulance and traveling expenses of Eldon Parke, all of which sums are legal, reasonable and necessary for the care of Eldon Parke and all of which does not exceed but equals the sum of \$3,671.56.

V.

That said accident was a third party accident

and under the laws of the State of Washington a workman has the election either to sue the negligent party or to take from the Accident and Medical Aid Funds of the Department of Labor and Industries; said Eldon Parke elected in writing to take from the Department of Labor and Industries and from the Accident and Medical Aid Funds and thereupon assigned in writing his claim to the Department of Labor and Industries of the State of Washington and the Accident and Medical Aid Funds thereof.

VI.

That the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S. 2177) wherein and whereby under section 131 of said law the Congress banned all private bills, but in said law provided that suit for the same may be instituted under the Federal Tort Claims Act and in accord with said law this suit and proceeding is brought; that under the laws of the State of Washington plaintiffs are entitled to recover in accord with the law of said state wherein the injury or negligence occurred and under said laws of the State of Washington recovery may be had in a third party accident but never to exceed the amount paid by the Department of Labor and Industries, to wit: in this cause, \$3,671.56.

VII.

That heretofore and prior to the passage of Public Law 601, the War Department had a rule and regulation refusing payment of all subrogations

and immediately after the passage of Public Law 601, the War Department changed its rules and regulations in accordance with Public Law 601 and now under its rules and regulations the rights of subrogees are determined in accordance with the laws of the place where the act or omission occurred out of which the claim arises.

Wherefore, plaintiffs pray for a judgment against the defendants in a sum not exceeding \$3,671.56 without interest and for plaintiff's costs herein.

SMITH TROY,
Attorney General.

.....

Harry L. Parr,
Assistant Attorney
General.

.....

Charles R. Nelson,
Assistant Attorney
General.

United States of America,
State of Washington—ss.

George H. Holt, Chief Assistant Attorney General, being first duly sworn on oath deposes and says: That he is the Chief Assistant Attorney General with powers to verify the Complaint in the absence of the Attorney General; that the Attorney General is now absent from the City of Olympia;

that affiant has read the above and foregoing 2nd amended complaint and knows the contents thereof and that he makes this verification for and on behalf of the State of Washington.

/s/ GEORGE H. HOLT,
Chief Assistant Attorney
General.

Subscribed and sworn to before me this 6th day of December, 1950.

[Seal] /s/ JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at Olympia, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER
AND CROSS-COMPLAINT

Comes now the defendant and for answer to plaintiffs' second amended complaint, denies and alleges as follows:

First Defense

That plaintiffs' second amended complaint fails to state a claim against this defendant upon which the relief prayed for can be granted.

Second Defense

I.

That defendant denies each and every allegation of plaintiffs' second amended complaint save and except what is hereinafter expressly admitted.

II.

That defendant admits paragraphs numbered I and II of plaintiffs' second amended complaint.

III.

Answering paragraphs III, V, VI and VII of plaintiffs' second amended complaint, this defendant admits that the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, Second Session (S. 2177), which permitted institution of suits under said act, designated as the Federal Tort Claims Act as alleged in paragraph VI of plaintiffs' second amended complaint, but as to all other alleged facts set forth in said paragraph this defendant alleges that it has no information or belief sufficient to enable it to answer the allegations therein contained, and for lack of such information and belief and basing its answer upon that ground, denies generally and specifically each and every other statement of alleged facts in said paragraphs contained.

IV.

Answering paragraph IV of plaintiffs' second amended complaint, the defendant admits that at the time and place mentioned therein that the Gov-

ernment's vehicle therein described was being operated by its employee, Corporal Clarence B. Nelson, of Vancouver Barracks, Washington, and that plaintiffs' vehicle, a Washington State Patrol car, was being operated by one Eldon J. Parke, a member of the Washington State Patrol, and that a collision of said vehicles then and there occurred, but denies that the defendant was negligent or that defendant driver was operating said Government vehicle in a careless, reckless, negligent or unlawful manner or at an excessive rate of speed for the time and place and under the circumstances then and there existing, and in that connection defendant states that if plaintiffs' driver, Eldon J. Parke, sustained any damage by reason of said accident to himself as therein alleged, that such accident and resulting damage, if any, were not proximately caused by any alleged act of negligence on the part of the defendant or defendant's driver, but was the direct and proximate result of plaintiffs' driver's own negligence and failure to exercise due care and caution, and yield the right-of-way to the Government's fire truck, which was an authorized emergency vehicle as defined by Sec. 6312-1(a) of Rem. Rev. Stats. of Washington, and was being operated in accordance with Sec. 6360-93, by a person approved as an operator in accordance with Sec. 6360-132 thereof; and that upon information and belief defendant denies that plaintiffs' driver suffered any injuries as alleged in plaintiffs' second amended complaint, and further thereupon denies that the Department of Labor and Industries paid

out of its funds for such alleged injury the sum of \$3,671.56, or any other sum whatsoever, and denies that such sum was a reasonable, proper, and legal amount and sum to pay to said Eldon J. Parke for such alleged injury.

Affirmative Defenses

Further answering said second amended complaint, and as a first affirmative defense, the defendant alleges as follows:

I.

That at the time in question, the plaintiffs were guilty of negligence which materially and proximately contributed to cause said accident and plaintiffs' alleged damages, if any; and which negligence consisted of the unlawful acts and omissions of plaintiffs' employee, the driver of said patrol car, in the following particulars:

1. In failing to yield the right-of-way to defendant's fire truck, an authorized emergency vehicle, which was then and there proceeding on an emergency mission.

2. In entering the intersection where the accident occurred without heeding the fire siren when he heard it, or in the exercise of reasonable care and attention as he approached the intersection, he would have heard the fire siren and, under the circumstances should have brought his vehicle to a stop in time to avoid said accident.

3. In failing to exercise and use such ordinary caution and care as a reasonably prudent and care-

ful person would have exercised under similar circumstances.

For further answer and for second affirmative defense, defendant alleges as follows:

I.

That heretofore and on the 20th day of May, 1948, in cause No. 1083 then pending in this court between the parties to the above-entitled action and for the same cause of action as that set forth in the second amended complaint, judgment of dismissal without costs and without prejudice was entered herein.

II.

That thereafter, and on the 17th day of January, 1949, in cause No. 1137 then pending in this court between the State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, plaintiffs, and United States of America, defendant, and for the same cause of action as that set forth in said second amended complaint, pursuant to motion to dismiss of the defendant and upon stipulation of the parties, judgment of dismissal without costs was entered, and that said judgment in said cause No. 1137 is final and conclusive upon the identical issues and cause of action stated in plaintiffs' second amended complaint in this action and has accordingly become res adjudicata of the matters and things alleged in plaintiffs' second amended complaint.

For further answer and for a third affirmative defense, the defendant alleges as follows:

I.

That the cause of action stated in plaintiffs' second amended complaint was not brought within the time provided by statute.

Cross-Complaint

The defendant, United States of America, by way of counter-claim and cross-complaint, complains against the plaintiff herein, the State of Washington, a sovereign state, and alleges as follows:

I.

That the defendant and cross-complainant, United States of America, is a sovereign entity.

II.

That the State of Washington is a sovereign state and one of the States of the United States, and the State vehicle, hereinafter referred to was owned by the State of Washington and operated by a State patrolman as the agent and employee of the State of Washington, and under direct supervision of the Washington State Patrol.

III.

That on or about 4:00 o'clock p.m., on March 9, 1945, a Government fire truck, which was an authorized emergency vehicle, operated by an approved operator as defined by State law, and which was being duly dispatched from the Post Fire Sta-

tion, Vancouver Barracks, Washington, to report to the City of Vancouver Fire Department, and being driven by Corporal Clarence B. Nelson, was proceeding west along 10th Street at the speed of approximately 30 miles per hour; that as said Government vehicle approached the intersection of 10th and Washington Streets in the City of Vancouver, Washington, the Government driver reduced the speed of said vehicle to approximately 25 miles per hour, at which time the red light on the front left fender was lit, and the fire siren was being sounded; that as the Government fire truck proceeded to cross and had reached the center of said intersection, the State Patrol car operated by Patrolman Eldon J. Parke, which had been proceeding along the inner lane of southbound traffic on Washington Street, entered the intersection and crossed directly in the path of the oncoming Government fire truck, causing the fire truck to strike the rear left of the State patrol car, the impact of which threw the said patrolman out of the vehicle in the manner more particularly hereinafter set forth.

IV.

That by reason of the premises it became necessary for the cross-complainant in repairing its vehicle damaged as aforesaid and in replacing parts thereof damaged, beyond repair, to expend for parts and labor the sum of \$60.76, all of which were necessary and reasonable to the damage of cross-complainant in the said sum of \$60.76, the same consisting of the following-described items, to wit:

1. Labor:

Repair front grill, 15 hours at \$1.27.....\$19.05

Straighten and repair frame, 10 hours

at \$1.27 12.70

Repair left front fender, 8 hours at \$1.27 10.16

Total cost of labor\$41.91

2. Parts:

New Bumper.....\$18.50

Miscellaneous35

Total cost of parts.....\$18.85

Total cost of repairs.....\$60.76

V.

That the sole and proximate cause of the accident and resulting damage was the negligence on the part of the driver of the State patrol car, which consisted of the following particulars:

(1) In failing to yield the right-of-way to defendant's fire truck, an authorized emergency vehicle, which was then and there at time of accident proceeding on an emergency mission.

(2) In entering the intersection where the accident occurred without heeding the fire siren when he heard, or in the exercise of reasonable care and attention as he approached the intersection, he would have heard the fire siren, and under the circumstances, should have brought his vehicle to a stop in time to avoid said accident.

(3) In failing to exercise and use such ordinary

caution and care as a reasonably prudent and careful person would have exercised under similar circumstances.

Wherefore, this defendant and cross-complainant prays that the plaintiffs take nothing by their action, and that the same be dismissed, and that the United States of America, cross-complainant herein, have and recover judgment against the plaintiff, State of Washington, in the sum of \$60.76, together with its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Affidavit of Mailing attached.

[Endorsed]: Filed December 15, 1950.

[Title of District Court and Cause.]

REPLY TO AMENDED ANSWER AND CROSS
COMPLAINT

Come now the plaintiffs and for reply to the amended answer and cross complaint of the defendant say:

I.

Deny each and every allegation and the whole thereof of that portion of the amended answer and cross complaint designated First Defense.

II.

Plaintiffs deny that portion of Paragraph III of the Second Defense that Eldon J. Parke was guilty of any act of negligence and any failure to exercise due care and caution and yield the right of way to the government's fire truck and deny that said fire truck at said time was an emergency vehicle or that the driver was an approved operator.

III.

Plaintiffs deny Paragraph I of defendant's amended answer and cross complaint designated as Affirmative Defenses and deny each and every allegation and the whole thereof in paragraph marked I, 1, 2 and 3.

IV.

Plaintiffs deny that portion designated for a further answer and second affirmative defense and numbered I, and II, asserting that said cause was dismissed not on the merits but because the Attorney General of the United States was not served and for no other reason and that the same is in res adjudicata.

V.

Plaintiffs deny that portion of Paragraph III of the cross complaint which alleges that the government fire truck was an authorized emergency vehicle operated by an approved operator as defined by state law and deny that Eldon J. Parke entered the intersection and crossed directly in the path of the oncoming government fire truck.

VI.

Plaintiffs deny each and every allegation and the whole thereof of Paragraphs IV and V of defendant's cross complaint.

Wherefore plaintiffs pray as heretofore in their second amended complaint.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

State of Washington,
County of Thurston—ss.

George H. Holt, being first duly sworn on oath says: That he is Chief Assistant Attorney General of the State of Washington and is empowered in the absence of the Attorney General to make this verification; that he has read the above and foregoing Reply and knows the contents thereof and believes the same to be true and that he makes the same for the State of Washington.

/s/ GEORGE H. HOLT.

Subscribed and sworn to before me this 18th day of December, 1950.

/s/ ERWIN E. DAVENPORT,
Notary Public in and for the State of Washington
residing at Olympia.

[Endorsed]: Filed December 18, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, coming on regularly for trial on the 18th and 19th day of December, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, plaintiffs appearing by their attorneys, Smith Troy, Attorney General of the State of Washington, and Harry L. Parr and Charles R. Nelson, Assistant Attorneys General, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington and Guy A. B. Dovell, Assistant United States Attorney for said district, and the court having heard and considered the arguments of defendant's counsel, upon the legal issues presented by the First Defense and Second and Third Affirmative Defenses contained in defendant's Amended Answer and Cross-Complaint, and overruled the same, and thereupon proceeded to trial, evidence both oral and documentary having been introduced; brief having been submitted and oral argument having been made by counsel for plaintiffs; and the court thereupon being fully advised in the premises, and having announced its decision orally, does hereby make the following:

Findings of Fact

I.

That in the above-entitled cause the State of

Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, as plaintiffs herein seek to recover from the defendant, United States of America, on a claim in the sum of \$3,671.56 assigned by one Eldon J. Parke, a state employee, to the State of Washington, for and on account of moneys paid to him or in his behalf in said amount out of the accident and medical aid funds of said state for personal injuries resulting from the collision between a patrol car owned by the State of Washington, and driven by Eldon J. Parke, and a government fire truck owned by the defendant and driven by Clarence B. Nelson, a government employee, which occurred on March 9, 1945, at the intersection of 10th and Washington Streets in the city of Vancouver, State of Washington.

That the claim and cross-claim herein arise under the Act of August 2, 1946, known as the Federal Tort Claims Act, (28 U.S.C.A. 931 et seq.; New Title 28, U.S. Code, Sections 1346 and 1402).

II.

That at the time of said accident and for a number of years prior thereto there had existed a verbal understanding and agreement between the civilian fire department of the City of Vancouver, and the U.S. Fire Department at Vancouver Barracks whereby mutual and reciprocal assistance was rendered to each other in time of need.

That the designated route at said time for travel by the government fire truck when answering a call

from the city for a standby truck was west from the Barracks along 10th Street, and across Washington Street to the city fire station located on 8th Street between Columbia and Washington Streets in the City of Vancouver.

III.

That at or about 4:00 o'clock p.m. on March 9, 1945, a government fire truck, which was an authorized emergency vehicle, operated by an approved operator as defined by state law, and which was being duly dispatched from the government fire station, Vancouver Barracks, pursuant to call received at the Post Fire Station from the city fire department for a government fire truck to stand by at the city fire station while the civilian fire department attended a fire call, and being driven by Corporal Clarence B. Nelson, one of the enlisted men on duty at the Post Fire Station, in response to said call, and accompanied by two other enlisted fire fighters, Pfc. Baldermar Valdez in the front seat, and Pfc. Hobart C. Cornell on the rear step, was proceeding West along 10th Street at a speed of approximately 30 miles per hour with the red light on the front left fender lit and the fire siren being sounded all the time; that as the fire truck reached the intersection of 10th and Washington Streets, Washington Street being a duly designated and marked arterial street pursuant to law, the speed thereof was reduced to approximately 25 miles per hour, and the fire truck, with its siren still sounding, and red light showing entered said intersection,

without stopping at the "stop" sign at said intersection and had reached the center thereof when it struck the state patrol car operated by Patrolman Eldon J. Parke, and which had been proceeding along the inner lane of southbound traffic on Washington Street, and he, failing to hear the fire siren in time, did not give way to the oncoming government fire truck, the fire truck striking the rear left of the state patrol car and the impact knocking the patrol car some 20 feet, throwing said patrolman out of the car and injuring him to the extent of the amount hereinbefore claimed, and damaging the fire truck in the sum of \$60.76, the amount expended for repairs on account thereof.

IV.

That neither of the drivers was exceeding the speed limit and both vehicles were emergency vehicles; that the state patrol car was enroute to Washington Patrol Office on First and Washington Streets, and not on an emergency call, and the issue herein resolves itself to whether in answering a call to the city fire station to report as a standby truck it can be said that the government fire truck was on an emergency call or not.

The government fire truck carried two fire fighters in addition to the driver, and with the city fire truck out it was extremely important that the government fire truck reached its destination as soon as possible. The Army had given orders that as soon as the fire truck reached 10th Street it should sound its siren and flash the red light, and the

siren was being sounded, accordingly. Under the facts as they existed and were so recognized by the Army and the City of Vancouver, it is clear that this trip was in fact an emergency trip, and that the government fire truck had the right of way enroute to the city fire station. The route established by Army order included crossing the intersection at 10th and Washington Streets, and it follows therefrom that the proximate cause of the accident was the failure of the driver of the state patrol car to yield the right of way to the defendant's fire truck, an authorized emergency vehicle, which was then and there at the time of the accident proceeding on an emergency mission.

See *Puget Sound Electric Ry. v. Benson*,
253 Fed. 710.

V.

That the defendant has not established by preponderance of evidence that the driver of the state patrol car heard, or in the exercise of reasonable care and attention as he approached the intersection would have heard the fire siren, and under the circumstances could have or should have brought his vehicle to a stop in time to avoid said accident, and for such reason recovery to the defendant in its cross-claim must also be denied.

Done in Open Court this 9th day of January,
1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

From the foregoing Findings of Fact, the court now concludes:

I.

That the court has jurisdiction of the subject matter of this action and cross-action and of the parties hereto.

II.

That the plaintiffs are not entitled to recover judgment on their action, and the defendant is not entitled to recover judgment on its cross-action; and the plaintiffs' action, and the defendant's cross-action should therefore each be denied and dismissed, and that the defendant is entitled to judgment for costs and judgment should be entered in accordance herewith.

Each of the parties, by counsel, has excepted to each and every adverse finding of fact and conclusion of law of the court hereinabove set forth and the defendant by counsel further excepts to the adverse rulings on its legal defenses set up in its amended answer, and each of said exceptions is hereby allowed.

Done in Open Court this 9th day of January, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

SMITH TROY,
Attorney General.

HARRY L. PARR,
Assistant Attorney General.

C. R. NELSON,
Assistant Attorney General.

Receipt of copy acknowledged.

Lodged January 4, 1951.

[Endorsed]: Filed January 9, 1951.

United States District Court, Western District of
Washington, Southern Division

No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly to be heard before the court on the 18th and 19th days of December, 1950; the plaintiffs appearing by their attorneys, Smith Troy, Attorney General of the State

of Washington, and Harry L. Parr and Charles R. Nelson, Assistant Attorneys General, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, and the court having heard the testimony of witnesses and received and considered the documentary evidence introduced herein, and heard the argument of counsel, and having heretofore on this day made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that neither the plaintiffs on their claim are, nor the defendant on its claim is, entitled to recover thereon, and that the same should be dismissed, and that the defendant is entitled to judgment for costs, and the court being fully advised in the premises, it is now, therefore,

Ordered, Adjudged and Decreed that neither the plaintiffs on their action nor the defendant on its cross-action shall recover judgment, and the plaintiffs action, and the defendant's cross-action be, and the same are hereby denied and dismissed; and it is further,

Ordered, Adjudged and Decreed that the defendant, United States of America, do have and recover judgment against the plaintiffs for its costs herein incurred, amounting to the sum of \$61.28.

Each of the parties, by counsel, has excepted to each and every adverse ruling of the court hereinabove set forth, and said exception is hereby allowed.

Done in Open Court this 9th day of January,
1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Lodged December 28, 1950.

Judgment entered in Civil Docket 7, January 9,
1951.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

DISBURSEMENTS

	Amt. Claimed	Amt. Allowed
Clerk's Fees	\$15.00	Paid
Marshal's Fees50	\$ 0.50
Attorney's Fees	20.00	20.00
Commissioner's Fees
Master in Chancery's Fees
Reporter's Fees
Witness:		
Clarence B. Nelson, 1848 St. Helens Avenue, Vancouver, Washington	25.78	25.78
Total.....	\$61.28	\$46.28

Taxed January 9, 1951.

/s/ E. E. REDMAYNE,
Deputy Clerk.

United States of America,
Western District of Washington—ss.

Guy A. B. Dovell, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ GUY A. B. DOVELL.

Subscribed and sworn to before me, this 9th day of January, 1951.

[Seal] /s/ WILLIAM C. ROFF,
Deputy Clerk, U. S. District Court, Western District of Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed January 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the State of Washington and Smith Troy, Attorney General of the State of Washington, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the

final judgment denying the plaintiffs the relief prayed for, which was entered in this action on the 9th day of January, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, appellants herein, and Lumbermen's Mutual Casualty Company, surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their successors and assigns, to make good all taxable costs and charges, not exceeding the sum of \$250.00, that the appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified.

The said surety hereby irrevocably appoints the clerk of this court as its agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed, and delivered this 7th day of March, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ [Indistinguishable.]
Lumbermen's Mutual
Casualty Company.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on January 9, 1951, which denies to the defendant recovery from the plaintiff upon its cross-action.

Dated this 8th day of March, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant and Cross - Complainant, United
States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

STIPULATION DESIGNATING PARTS OF
RECORD TO BE OMITTED FROM THE
RECORD ON APPEAL

Pursuant to Rule 75(o) of the Federal Rules of Civil Procedure for the District Courts of the United States, and the provision for hearing of appeals on original papers by Rule 11 of the United States Court of Appeals for the Ninth Circuit, effective January 1, 1949; it is hereby,

Stipulated, Agreed and Understood by and between Smith Troy, Attorney General of the State of Washington, and Harry L. Parr and C. R. Nelson, Assistant Attorneys General of the State of Washington, attorneys of record herein for plaintiffs, and J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, attorneys of record herein for defendant, that all the original papers of record in the above-entitled court and cause, with the exception of the following named, to wit:

1. Order granting leave to file Second Amended Complaint.
2. Second Amended Complaint.
3. Amended Answer and Cross-Complaint.
4. Reply to Amended Answer and Cross-Complaint.
5. Findings of Fact and Conclusions of Law.
6. Judgment.

7. Cost Bill.
8. Plaintiff's Exhibits Nos. 1, 2 and 3.
9. Defendant's Exhibit A-1.
10. Stipulation admitting Defendant's Exhibit A-1 into the Record.
11. Reporter's transcript of all proceedings and evidence had in this Cause.
12. Notice of Appeal (Plaintiffs').
13. Appeal Bond with Power of Attorney attached.
14. Notice of Appeal (Defendant's).
15. This Stipulation covering record on Appeal.
16. Statement of Points (Plaintiffs').
17. Statement of Points (Defendant's).

Are to be omitted from the record on appeal.

Dated this 22nd day of March, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

J. CHARLES DENNIS,
U. S. Attorney, Western
District of Wash.

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney, Western District of
Washington.

[Endorsed]: Filed March 22, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a Statement of Points on which appellants, State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, intend to rely on Appeal:

I.

That the District Court erred in finding and concluding that the City of Vancouver, Washington, recognized the trip of the Army fire truck, from Vancouver barracks to the City fire station, to act as a standby vehicle, as an emergency trip.

II.

That the District Court erred in finding and concluding that the Army fire truck, in answering a call to the City fire station to report as a standby truck, was on an emergency call.

III.

That the District Court erred in finding and concluding that the proximate cause of the accident was the failure of the driver of the State Patrol car, an emergency vehicle, to yield the right of way to the Army fire truck, an emergency vehicle.

IV.

That the District Court erred in holding that the Plaintiffs' were not entitled to recover judgment on their action, and in denying and dismissing Plaintiffs' action, in that such dismissal is contrary to

evidence, and contrary to the law governing the case; in awarding Defendant judgment for costs.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action by their respective attorneys and subject to the approval of the Court as follows:

That the certified copies of the following named pleadings in Civil Cause No. 1137, records of this Court, attached hereto and marked "Defendant's Exhibit A-1," to wit:

1. Complaint.
2. Defendant's Motion to Dismiss.
3. Stipulation and Order of Dismissal.

may now be filed as an exhibit in the above-entitled action and may be considered as evidence by the court as though the same had been admitted in the evidence at the time of trial.

It Is Further Stipulated by said parties that this stipulation and attached exhibit, with approval of the Court, shall be filed with the Clerk of said Court as a part of the record on appeal in the above-entitled cause and included in the stipulation designating parts of the record, proceedings and evidence to be included with the record on appeal.

Dated this 15th day of March, 1951.

SMITH TROY,
Attorney General,

By /s/ C. R. NELSON,
Asst. Atty. Gen.,
Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant.

Approved:

/s/ CHARLES H. LEAVY,
United States District Judge.

DEFENDANT'S EXHIBIT A-1

In the District Court of the United States for the
Western District of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiffs and for cause of action
against the defendants allege:

I.

That the State of Washington is a sovereign state
and one of the states of the United States; that the
Department of Labor and Industries is an adminis-
trative agency of the State of Washington created
by an act of the state legislature, whose duty is
collection of the debts to be used exclusively for the
payment of compensation to injured workmen who
are injured in the course of their employment
within the State of Washington; that Smith Troy
is the duly elected, qualified and acting attorney
general of the State of Washington and charged by
law with the duty of collecting all monies due or to

become due the State of Washington or any of its administrative agencies.

II.

That this cause is brought to this court which, by virtue of Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S.2177) and specifically under sections 401-422 of said act, same being entitled the Federal Tort Claims Act (28 U.S.C.A., section 931), has jurisdiction to try said cause, the jurisdiction of this court being founded upon said act of Congress last mentioned; that the army vehicle hereinafter referred to was owned by the United States of America and operated by army personnel as the agent of the United States of America and under direct supervision of the Secretary of War.

III.

That under the laws of the State of Washington, there is no statute of limitations as against debts due the State of Washington, Department of Labor and Industries, in its sovereign capacity; that the State of Washington administers workmen's compensation in its sovereign capacity and when an injured workman elects to take from the State of Washington and assigns his claim to the state, no statute of limitations runs against such claim.

IV.

That on the 9th day of March, 1945, Eldon Parke was engaged in employment within the State of Washington covered by the Workmen's Compensation Act; that on said day, Eldon Parke was work-

ing for his employer, the State of Washington (Washington State Patrol Division) proceeding south on Washington Street in the City of Vancouver, County of Clark, State of Washington, enroute to the Washington Patrol office on First and Washington Streets, in said city, and was traveling between 15 and 20 miles per hour and in all respects complying with the law, when a United States Army fire truck operated by Clarence B. Nelson, a corporal in the United States Army, traveling at a speed of 50 miles per hour, same being an excessive rate of speed for the time and place, struck the car being operated by the said Eldon Parke, all without fault on the part of the said Eldon Parke and thereby injuring the said Eldon Parke by causing multiple contusions and abrasions and double fracture of the right femur and by reason of said injury the Department of Labor and Industries paid out of the Accident and Medical Aids Funds for the injury of the said Eldon Parke the sum of \$3,651.56, which was a reasonable, proper and legal amount and sum to pay to the said Eldon Parke for his injury.

V.

That said accident was a third party accident and under the laws of the State of Washington a workman has the election either to sue the negligent party or to take from the Accident and Medical Aid Funds of the Department of Labor and Industries; said Eldon Parke elected in writing to take from the Department of Labor and Industries and from

the Accident and Medical Aid Funds and thereupon assigned in writing his claim to the Department of Labor and Industries of the State of Washington and the Accident and Medical Aid Funds thereof.

VI.

That the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S.2177) wherein and whereby under section 131 of said law the Congress banned all private bills but in said law provided that suit for same may be instituted under the Federal Tort Claims Act and in accord with said law this suit and proceeding is brought; that under the laws of the State of Washington plaintiffs are entitled to recover in accord with the law of said state wherein the injury or negligence occurred and under said laws of the State of Washington recovery may be had in a third party accident but never to exceed the amount paid by the Department of Labor and Industries, to wit, in this cause, three thousand six hundred fifty-one and 56/100 dollars (\$3,651.56).

VII.

That heretofore and prior to the passage of Public Law 601, the War Department had a rule and regulation refusing payment of all subrogations and immediately after the passage of Public Law 601, the War Department changed its rules and regulations in accordance with Public Law 601 and now under its rules and regulations the rights of subrogees are determined in accordance with the laws of

the place where the act or omission occurred out of which the claim arises.

Wherefore, plaintiffs pray for a judgment against the defendants in a sum not exceeding three thousand six hundred fifty-one and 56/100 dollars (\$3,651.56) without interest or principal and for plaintiffs' costs herein.

SMITH TROY,

Attorney General,

/s/ RUDOLPH NACCARATO,

Assistant Attorney General.

United States of America,
State of Washington—ss.

Smith Troy, being first duly sworn on oath, deposes and says: That he is the regularly elected, acting and qualified Attorney General of the State of Washington; that he has read the above and foregoing complaint and knows the contents thereof and that he makes this verification for and on behalf of the State of Washington.

/s/ SMITH TROY.

Subscribed and sworn to before me this 4th day of June, 1948.

[Seal] /s/ JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington
residing at Olympia.

Certified true copy.

[Endorsed]: Filed June 4, 1948.

United States District Court for the Western
District of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION TO DISMISS

Comes now the United States of America, defendant above-named, and moves to dismiss this action for the reason and upon the grounds as follows:

I.

That the cause of action stated in the complaint of the plaintiff herein accrued on March 9th, 1945, and suit was not filed within one year after August 2, 1946, as required by Section 420 of the Federal Tort Claims Act, and this suit is barred by the statute of Limitations. (Title 28, U.S.C.A. Sec. 942)

II.

That the assertion of the claim herein is also

barred by the Anti-Assignment Statute. (Title 31 U.S.C.A. Section 203)

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, for Defendant.
Office & Post Office Address 324 Federal Bldg.,
Tacoma, 2, Wash.

Certified true copy.

[Endorsed]: Filed July 21, 1948.

United States District Court, Western District
of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION AND ORDER
OF DISMISSAL

STIPULATION

Pursuant to defendants' motion to dismiss on

grounds that the above-entitled suit is barred by the Statute of Limitations,

It Is Hereby Stipulated and Agreed that the above-entitled action be discontinued without cost to either party as against the other, and that an order to that effect may be entered by either party without notice.

Dated this 10th day of January, 1949.

/s/ SMITH TROY,

Attorney General of the
State of Washington.

/s/ RUDOLPH NACCARATO,

Assistant Attorney General.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ GUY A. B. DOVELL,

Asst. United States Attorney.

ORDER OF DISMISSAL

Pursuant to the foregoing stipulation, and the Court being fully advised in the premises, it is now, therefore,

.Ordered, Adjudged and Decreed that the above-entitled cause be and the same is hereby dismissed without costs to either party as against the other.

Done In Open Court this 17th day of January, 1949.

/s/ CHARLES H. LEAVY,

United States District Judge.

Approved and Notice of Entry waived:

/s/ RUDOLPH NACCARATO,
Of Counsel for Plaintiff.

Presented by:

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Certified true copy.

[Endorsed]: Filed January 17, 1949.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of points on which defendant United States of America, appellee and cross-appellant, intends to rely on appeal.

I.

That the United States is entitled to recover the amount of its damages claimed in its cross-action.

II.

That the District Court erred in concluding that the United States was not entitled to recover judgment on its cross-action, and in refusing to grant judgment thereon in the amount of \$60.76, the amount of damages found by the court.

III.

That the plaintiffs, appellants and cross-appellees

herein, are not entitled to recover on their cause of action herein for each and all of the following and separate reasons, namely:

1. That defendant's fire truck was an emergency vehicle, as defined by law, on an emergency call and was entitled to the right of way, and the failure and neglect of plaintiffs' vehicle to yield the right of way was the proximate cause of the accident.

2. That regardless of the nature of the call being answered by defendant's fire truck, plaintiffs' driver was guilty of contributory negligence when he heard the siren and failed to observe the fire truck and failed to do anything to avoid the accident.

3. That the cause of action set up by plaintiffs in their present action was heretofore dismissed in a prior action between the same parties, and pursuant to Rule 41(b) of Federal Rules of Civil Procedure, such dismissal, not otherwise specified in the order, operated as an adjudication upon the merits, and the matters alleged in the complaint are and have become *res adjudicata*.

Dated this 19th day of March, 1951.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Attorneys for
United States of America, Appellee and cross-
appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 22, 1951.

In the District Court of the United States for the
District of Washington, Southern Division

Civil Docket Number 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, Attorney General,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Transcript of proceedings had in the above-entitled and numbered cause had in the above-entitled court before the Honorable Charles H. Leavy, United States District Judge, at Tacoma, Washington, commencing at 2:00 o'clock, p.m., on the 18th day of December, 1950.

Appearances:

HARRY L. PARR, ESQ.,

Assistant Attorney General, and

C. R. NELSON, ESQ.,

Assistant Attorney General,

Temple of Justice, Olympia, Washington,

Appeared for Plaintiffs; and

GUY A. B. DOVELL, ESQ.,

Assistant United States Attorney,

Federal Building, Tacoma, Washington,

For Defendant.

PROCEEDINGS

The Court: Docket 1326, State of Washington, et al., vs. United States, for trial to the Court Are the parties ready?

Mr. Parr: The Plaintiffs are ready, your Honor.

Mr. Dovell: The Government is ready, your Honor.

The Court: I have gone over these pleadings somewhat, and the amended Complaint has been responded to now by an Answer, and, among other things, there is a challenge to the jurisdiction of the Court to try this case because of the fact that the statute of limitations has run against it.

Is that correct, Mr. Dovell?

Mr. Dovell: Yes, your Honor.

The Court: And then there is, if the Plaintiffs can overcome that difficulty, this further matter; well, it is a defense on the facts, I guess: Failure to yield the right of way.

Mr. Dovell: There is the further defense of res adjudicata.

The Court: And that is based on the former order of dismissal herein, Mr. Dovell?

Mr. Dovell: In cause number 1137, in the second case.

The Court: Well, I think before we attempt to go into the merits of this we will have to make a disposition of these matters that are strictly matters of law, and the first one, perhaps, in order would be this question of res adjudicata, Mr. Dovell, and I [2*] want to hear from you on that.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Dovell: The order that was entered in the cause number 1137—that was the second action to be brought covering this claim, your Honor——

The Court: Yes.

Mr. Dovell: In that case the Defendant had made a motion to dismiss which stated:

“That the cause of action stated in the complaint of the plaintiff herein accrued on March 9, 1945, and suit was not filed within one year after August 2, 1946, as required by Section 420 of the Federal Tort Claims Act, and this suit is barred by the Statute of Limitations.”

But later, prior to having the case set down for hearing on that motion, the Attorney General, Smith Troy, and Rudolph Naccarato, Assistant Attorney General, entered into a stipulation with the United States Attorney and myself, in which stipulation it was stated that:

“Pursuant to defendant’s motion to dismiss on grounds that the above-entitled suit is barred by the Statute of Limitations, it is hereby stipulated and agreed that the above-entitled action be discontinued without cost to either party as against the [3] other, and that an order to that effect may be entered by either party without notice.”

And the Court entered the order on the 17th day of January, 1949, in which it was stated:

“Pursuant to the foregoing stipulation, and the Court being fully advised in the premises, it is now, therefore, Ordered, Adjudged and

Decreed that the above-entitled cause be and the same is hereby dismissed without costs to either party as against the other.”

The Court said nothing about prejudice.

Under Rule 41 of the Federal Rules of Civil Procedure—and this was pursuant to a motion to dismiss—the last sentence in paragraph (b) of Rule 41 states:

“Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

The Court: Read that again, Mr. Dovell.

Mr. Dovell: Yes.

“Unless the court in its order for [4] dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

Your Honor, where there has been an interpretation of that provision as to *res adjudicata*, it is—I cite the case of—*American National Bank and Trust Company of Chicago vs. United States*, in 142 Federal Second, page 571: This is a case in which action was brought on a war risk term insurance policy by the American National Bank and Trust Company of Chicago, conservator of an incompetent veteran’s estate, against the United

States of America. Judgment was for the Defendant and the Plaintiff appeals. It was affirmed. This was from the United States Court of Appeals for the District of Columbia, and it was decided May 8, 1944, and the Court said:

“Appellant had previously sued on the same policy in the United States District Court for the Northern District of Illinois. That suit was ‘dismissed for want of prosecution’ on January 31, 1940. The present suit was filed in the District of Columbia on January 27, 1941.

“Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, 28 U. S. C. A. [5] following section 723c, dismissal of a suit at the plaintiff’s instance is ‘without prejudice’ unless otherwise specified in the order. But under Rule 41(b) a dismissal on defendant’s motion, and likewise a dismissal not provided for in the Rules, ‘operates as an adjudication upon the merits’ unless otherwise specified in the order. The court has inherent powers to dismiss, on its own motion, for want of prosecution. Such a dismissal is not provided for in the Rules, and therefore operates as an adjudication upon the merits.”

This particular motion he is referring to is the one that the Court observed as not mentioned in the Rules. That is what we would term our local rule 41.

“In an effort to show that the suit in Illinois was dismissed at the plaintiff’s instance, and also that the judge intended the dismissal to be without prejudice, appellant offers an affidavit

of its former attorney. The judgment of a court cannot be modified by extrinsic evidence. Moreover the affidavit does not assert what [6] appellant seeks to show. On the contrary, it says that the court disposed of the suit 'on his own motion.' It intimates that appellant asked and the court declined to have the order include the phrase 'for reasons not affecting the merits.' It says that the court offered to give a 'certificate that the case was not called for trial; that no proceedings were had as affecting the merits, and that it was not, in any event, considered on the merits.' The affidavit comes only to this; the judge was unwilling to draw the order of dismissal so that it might not conclude the merits, but willing to certify to the fact that he had not considered the merits. That fact is legally irrelevant. Even if the court had made the suggested certificate it would have been useless to appellant. Since (1) the dismissal was on the court's motion, (2) by Rule 41 (b) such a dismissal, unless otherwise specified in the order, operates as an adjudication upon the merits, and (3) the court did not otherwise specify in the order, the dismissal necessarily operated as [7] an adjudication upon the merits. If the affidavit is correct, this appears to have been what the court intended.

Appellant seeks to avoid *res adjudicata* by claiming a substantive right to sue, which the Rules of Civil Procedure should not be permitted to abridge. He bases this claim upon a

provision in the World War Veterans' Act that 'if suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has lapsed.' But this provision merely extends the period of limitations. It does not abrogate the principle of *res judicata*. The new action may be brought only 'if one lies.' "

This amended act extended the time one year after the effective date of the amendment. That we contend is applicable to any contention that the statute would be subject—that is, *res adjudicata* would be subject—to that statute. It eliminates the decision of the Court.

This case was a case in which the United States was also involved. [8]

The Court: I will hear from you, Mr. Parr.

Mr. Parr: If your Honor please, I am hard of hearing.

The Court: We are discussing only this issue of *res adjudicata*.

Mr. Parr: Yes. If the Court please, we take the position here, first, that I don't understand any motion could be made here that this Complaint is not timely filed. The Court will remember that when I asked for an amendment I recited number (c) in Rule 15, and the amendment always goes back to the time of the original Complaint. I based it on that. So that I won't spend much time on that.

Now, the reason that we are here now, if the Court please, is that the case that was dismissed without prejudice—I was not in it but I know about that case—that case was dismissed long before the one that the United States Attorney had dismissed. Your Honor never went into that case at any time. Now this case is timely because the Act passed by the Congress—

The Court: I would rather not discuss that. That deals with the statute of limitations. I would rather you confine your argument to whether that dismissal is *res adjudicata*.

Mr. Parr: That is the dismissal because of non-service on the United States Attorney. That is the reason for the dismissal.

Mr. Dovell: No, that was the first case.

The Court: No, the second case is that it was [9] practically a stipulated dismissal.

Mr. Dovell: I will supply counsel with a copy.

Mr. Parr: I should be glad to be supplied because that is not my understanding. My understanding is that the first case was served on the United States Attorney and the first case was dismissed without prejudice.

Now the second case, if the Court please—my understanding is and it can be corrected if I am wrong—is that the only reason for dismissing the second case—Mr. Naccarato's case—is that the Attorney General of the United States had not been served.

The Court: The second case?

Mr. Parr: That is my understanding. The only reason.

The Court: No. If you will examine the files, I think you will find to the contrary. I have only a remote recollection. I haven't examined the files. Do you have the files on the second case here?

Mr. Parr: That is the only matter before the Court?

The Court: At the moment, yes.

Mr. Parr: There is another question that the law was amended to bring us in if we haven't res adjudicata.

The Court: Well, we will discuss that a little later.

Mr. Parr: If the Court please, I am going to let Mr. Nelson finish this.

The Court: Very well. Now, Mr. Nelson? [10]

Mr. Nelson: Your Honor, I am not familiar with the file here. However, as I understand it, the cause that was dismissed by stipulation, which counsel maintains is res adjudicata, was dismissed for the reason that counsel for Plaintiff and Defendant agreed that it was not timely brought. Is that correct, counsel?

Mr. Dovell: Pursuant to my motion to dismiss on that ground.

Mr. Nelson: Pursuant to your motion to dismiss on that ground. I assume that the reason being that in the original Act the Congress provided a certain period in which tort claims against the Government could be filed, and I assume further that the action which counsel maintains was dismissed with preju-

dice was dismissed because counsel for both parties agreed that the action had not been brought within the statutory time permitted by the original act of the Congress.

I want to point out to the Court that the Act passed by Congress was enacted April 25, 1949, reads as follows:

“A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues * * *”

which is the reason that the first one was dismissed, “* * * or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding \$1,000, it is presented [11] in writing * * *”

and so on.

Your Honor, I want to point out to the Court that on April 5, 1949, this statute was amended.

The Court: I am quite familiar with that, but I want to stay with Mr. Dovell's argument that this dismissal on January 17, 1949, is *res adjudicata* of the case under the provisions of Rule 41(b), and I want to say, Mr. Dovell, I am a little inclined to doubt that unless 41(b) provides for involuntary dismissal.

Mr. Dovell: My motion—your Honor, if it was dismissed pursuant to my motion, it was certainly involuntary.

The Court: The files indicate it was dismissed in furtherance of a stipulation. Your motion preceded

the stipulation, but the stipulation was made. Just what motives actuated the making of the stipulation in addition to your motion, I don't know, but it was doubtless a persuasive one. But, nevertheless, the record indicates here that:

“Pursuant to Defendant's motion to dismiss on grounds that the above-entitled suit is barred by the Statute of Limitations, it is hereby stipulated and agreed that the above-entitled action be discontinued without cost to either party * * *”

Mr. Dovell: It operates as an adjudication on the merits and that will be found in the first part of the rule. [12]

The Court: Well, that isn't applicable here. In the first one—I haven't examined that file—the Plaintiffs moved for dismissal. In the second one the Defendant challenged the Plaintiffs' right of recovery on the ground that the claim was barred by the statute. Before that motion could be heard the parties stipulated for a dismissal. It could hardly be held that the Plaintiffs were the moving party in this second dismissal so as to bring them under the provisions of Rule 41(a)

Mr. Dovell: I mean if it was considered a voluntary dismissal.

The Court: It was considered. It is not a matter of consideration. It is a matter of the record itself; a dismissal on stipulation. The Plaintiffs became concerned relative to the statute of limitations and when challenged on that ground stipulated a dismissal. Later on they came to the conclusion that

they were in error in the interpretation of the Act of Congress, that had been just enacted shortly before, extending time to two years and they instituted the present action.

I am satisfied I shall have to rule against you on the ground of *res adjudicata*, Mr. Dovell.

Mr. Dovell: Exception.

The Court: And then you come to the question of whether this is timely or whether you challenge on the statute of limitations and I may save some time by indicating what I think you will have to show in order to convince the Court that your position is sound [13] so that I would have to follow it, and that is this: I am quoting now from the United States Code, Congressional Service, Volume 2, the 81st Congress, one by the way that is still in session and was when this amendment was enacted. And I take it that the statements made by the Committee reporting this bill out is the best evidence that we can have as to the intent of Congress at the time, and I don't know of any cases that can be found since this enactment that go into the matter. So, in many respects, it is a matter of first impression so far as I know in any Appellate Court. I want to read to you what the Committee said in reporting this amendment out. I am reading now.

“The reported bill would enlarge the period for filing to 2 years from the date of accrual of the cause of action * * *”

I might say here this cause of action accrued long before the two year period so that it is out on that phase of the law.

“* * * or 1 year from the effective date of the amendatory act, whichever occurs later. The bill would, therefore, revive all those otherwise expired claims accruing on or after January 1, 1945, which (1) have not been determined adversely by a Federal agency or a Federal court, or (2) have been rejected by a Federal agency or a Federal court solely because of the statutory bar.” [14]

That is as far as I feel it is necessary to quote that. There is some further language, but the report of the Congressional Committee that accompanied this bill, and upon which it was enacted, seems to me to clearly indicate that whatever happened to the claim of the State of Washington against the United States, it was revised when Congress elected to extend the statute of limitations.

What do you have to say to that, Mr. Dovell?

Mr. Dovell: Even though dismissed with prejudice?

The Court: It wasn't dismissed with prejudice. Let's stay well within the record always. It was dismissed—the Court has determined—by stipulation.

This third action, if we can call it that, was commenced about one month or so before the one year period after the enactment of amended tort claims act fixing time. Am I correct in that?

Mr. Dovell: Yes.

The Court: So that I think the Plaintiffs have overcome both of those objections, and I must rule against the Government on both your objections.

Then we get to the merits of the case and, really, we should have had a pre-trial conference. The parties are all here and perhaps we can have one now. You can stipulate to most of these facts. These Federal tort claims are required to be based upon the law of the particular state where they arose and where they are tried.

If under state law and decision the action is maintainable, then the Federal action is maintainable in Federal court. If not, you [15] couldn't maintain an action.

Now here there isn't any question about the fact that if this was a Government operated vehicle that caused injury to an individual, under the laws of this State it would be an action upon which suit could be maintained.

But there is the other issue that has been raised by these pleadings and that was, that this was an emergency vehicle, a fire truck, going to some particular place in reference to municipal activities in the City of Olympia.

Mr. Dovell: Vancouver.

The Court: Or Vancouver. And, if that is a fact, then you refer back to the State Statutes and there is some statute, isn't there, that gives those vehicles the right of way?

Mr. Nelson: Your Honor, the Statute giving emergency vehicles certain immunities towards use of the road says:

“* * * when actually answering an emergency call.”

The Court: Would you stand up, please?

Mr. Nelson: Excuse me, your Honor. The position of the State is that this fire truck is not an emergency vehicle within the provisions of that statute and, further, the fire truck ran into a highway patrol car, which by the same reasoning, if we will use the same statute to define one as the other, was also on an emergency run. But, our position is that the statute which gives immunity exclusively [16] says:

“* * * when actually answering an emergency call.”

The Court: Could it be stipulated as to whether this fire truck was answering an emergency call at the time of the collision?

Mr. Nelson: Our position is that “emergency call” is the technical phrase upon which the outcome of this case depends. We have a brief citing numerous cases. It is an emergency vehicle within the contemplation of a statute very similar to this.

The Court: What I am trying to get at is to see if we can’t simplify and shorten the matter. The parties can agree as to whether this fire truck was responding to a call.

Mr. Nelson: Well, your Honor, in the Defendant’s answer and cross-complaint, he admits that the fire truck was on its way from the Vancouver Barracks, and Army reservation, to the fire house of the City of Vancouver.

The Court: Then it could be stipulated that it was not responding to a call in the sense it was a fire?

Mr. Nelson: We could stipulate that.

Mr. Dovell: We couldn't stipulate to that. It was going to the fire house belonging to the City of Vancouver, and could also go to a fire.

Mr. Parr: That isn't what his point was.

The Court: Was it on its way to a fire?

Mr. Dovell: No, it was not. [17]

The Court: It was not answering a call——

Mr. Dovell: ——to go to a fire.

The Court: But it was going to hold itself in readiness to answer a call. Could the parties stipulate to that?

Mr. Nelson: We can, your Honor.

The Court: Now, what about the highway patrol? Was he answering an emergency call?

Mr. Nelson: He was doing the same thing as the fire truck. He was going to his headquarters and not answering a call.

The Court: With those two stipulations we can take a lot of proof out of the case and then we get down to the question, possibly, of an interpretation—of what you consider—an emergency.

You can stipulate on both sides that both these vehicles, the Government truck and the State patrol officer's conveyance, were public conveyances and were engaged in the performance of their duty but not answering any emergency when the collision occurred.

Mr. Dovell: I wouldn't be advised at this time, your Honor, whether to stipulate that that was not an emergency.

The Court: Well. Mr. Dovell, pre-trial confer-

ences are to get at things that it will not avail you to deny.

Mr. Dovell: Yes, your Honor.

The Court: And we get nowhere with the issues if you do not cooperate. I don't want to argue now but it appears that that is what it was. But I haven't made up my mind whether one, or both, or either of them were classified under the State law as being in that [18] exempt class where they were given the right of way over the road.

You can stipulate, I assume, if the pleadings do not go to that extent, that one vehicle was going in a certain direction upon a certain street and the other in another, and, normally, if they were private vehicles, you could stipulate as to which one would have had the right of way.

Can you do that?

Mr. Dovell: Not very well without the evidence, your Honor.

The Court: Well, you have talked to your people. I want to shorten this if I can, Mr. Dovell. You know in what direction and upon what street or highway this truck was going.

Mr. Dovell: It was going on Tenth Street, and I understand——

The Court: And moving in a northerly or easterly or southerly direction?

Mr. Dovell: In a westerly direction.

The Court: Moving in a westerly direction?

Mr. Dovell: Yes, sir.

The Court: And it approached the intersection of—what is the other street?

Mr. Nelson: Washington Street.

The Court: And Washington Street runs north and south?

Mr. Nelson: It does, your Honor. [19]

The Court: And the vehicle coming up Washington Street——

Mr. Nelson: Was going in a southerly direction.

The Court: And the Government vehicle approached from the right or left?

Mr. Nelson: From the left of the highway patrol.

The Court: So that it would be moving in a westerly direction?

Mr. Dovell: Yes, your Honor.

The Court: And they collided in the intersection?

Now, there is no reason why you can't stipulate to those facts without formal proof.

Mr. Dovell: We can stipulate to that fact, your Honor.

The Court: Very well.

Then, with that stipulation and leaving open the question as to whether either was engaged in an emergency, or falls within the classification of an emergency vehicle, you get the simple question as to whose negligence caused this accident; and that ought to be the only issue that we will have to try here—aside from the measure of damages. Well, the measure of damages likewise need not be tried here.

Mr. Nelson: It was denied in the reply, your Honor.

The Court: Well, do you contend that the State

could not be subrogated to the rights of the driver of the patrol car? [20]

Mr. Dovell: Your Honor, I don't know how much damages were paid. We are agreeing.

The Court: They are undoubtedly part of the record.

Mr. Dovell: If there was some proof——

The Court: Well, this is the time, Mr. Dovell. In these pre-trial conferences we proceed informally and that is what I am doing now. Normally counsel are sufficiently cooperative that they do not need the Court's assistance. If the State has vouchers and claims here of payments, that is all you would need.

Mr. Dovell: That is all I have ever required, your Honor.

The Court: I assume they are willing to show it.

Mr. Dovell: And the amount of money damages can be listed at the same time.

The Court: I suppose. I don't know.

Mr. Nelson: That will be stipulated to, your Honor.

The Court: Very well. So that now, with those stipulations, we have left ourselves pretty much the simple question as to the speed that the vehicles were going at the time and how they approached and whose negligence, if anyone's, it was, or whether the accident was the combined negligence of both parties.

I have another matter that I must take up now for a while and if you could draw up a stipulation

on those facts while we are hearing the other matter, we can get them out of the way.

Mr. Dovell: The Reporter's notes will cover what [21] we have stipulated to, your Honor. I haven't any way of getting them prepared.

The Court: I think that I can hear this case now, since this is out of it; and probably still leaving open this question of emergency that might be involved because I might want some citations and authorities on that.

You better get together and talk this over now as to what you have stipulated to so that you don't come back in here and not agree.

I think I will adjourn this case now until——

Mr. Nelson: Your Honor, we have one witness as to the origin of the record and under the stipulation I think she could be excused and wouldn't be needed. May I excuse her? It was just to testify that this was from the Department of Industries.

Mr. Dovell: I would like to see the record.

The Court: You may see it. It is just that they want to excuse the witness. You may excuse her and then this cause will be adjourned for the time being.

(Whereupon, at 2:45 o'clock, p.m., hearing in the within-entitled and numbered cause was adjourned until 3:30 o'clock, p.m., December 18, 1950, at which time the following proceedings were had, to wit:)

The Court: Mr. Dovell?

Mr. Dovell: Your Honor, we have been able to arrive at a stipulation as to the issues in this case

of State of Washington [22] against the United States of America, restricting it to the controversy of:

“Was the fire truck answering an ‘emergency call’ within the contemplation of Remington’s Revised Statutes, §6360-5 and any others applicable which give certain immunities to emergency vehicles ‘actually responding to an emergency call’?”

And, in case it wasn’t an emergency vehicle, then the question would fall back upon a doctrine that would be applicable to any private vehicle.

The Court: Well, Mr. Dovell, during the recess Mr. Cantlon called my attention to that statute and the statute doesn’t say an emergency vehicle answering an emergency call, but it classifies certain things as emergency vehicles which are sounding sirens or ringing bells and many of those things. I was in error when we considered this before in considering whether it was answering an emergency call. It is stipulated, as I understand it, that both vehicles fell under the classification of what would be an emergency vehicle. One was in the law enforcing arm of the State, a State patrol car, and the other was a fire apparatus belonging to the United States Government going to make itself available to the City of Vancouver.

There is no issue on that, is there?

Mr. Nelson: No, your Honor. [23]

The Court: And then the statute, instead of saying that they had to be going or answering an

emergency call, is silent on that, unless there is a construction of it by the Supreme Court of this State.

Mr. Nelson: Are you speaking of the one that gives the immunities to the emergency vehicles?

The Court: Yes.

Mr. Nelson: Which is 6360—

The Court: Will you just read that?

Mr. Nelson (Continuing): — -5. The provisions of this Act, which is the “Vehicle operation and equipment, etc.” act?

The Court: Yes.

Mr. Nelson:

“The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:

“(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: [24]

“Provided, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: Provided, further,

The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized."

The Court: That isn't what you showed me at the intermission.

Mr. Cantlon (Law Clerk): I believe Section 6360-93 was the one I showed to your Honor.

The Court: Because this one does refer to an emergency call.

Mr. Nelson: Dash 93 says, your Honor.

"Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of [25] every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the public highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a peace officer. Upon the immediate approach of an authorized emergency vehicle, street cars shall be stopped unless otherwise directed by a peace officer. When the operator of any vehicle is complying with the provisions of this section, he shall give proper hand signal indicating his intended movement."

The Court: Were those two statutes enacted simultaneously?

Mr. Nelson: Yes, sir. The Laws of 1937, Chapter 189.

The Court: Well, the last one is sort of a qualifying statute of the first one, which is general in its nature.

Mr. Nelson: I think it is the other way around. I think the last one speaks of emergency vehicles as a class.

The Court: Yes. [26]

Mr. Nelson: It is a general one. The first one speaks of emergency vehicles but says they do not have these immunities unless actually responding to an emergency call.

The Court: Is there a definition in that rule as to what constitutes an emergency vehicle?

Mr. Nelson: There is, your Honor.

The Court: And that brings both of these vehicles involved here within it?

Mr. Nelson: Within it.

The Court: There is no question in your mind, Mr. Dovell?

Mr. Dovell: No, your Honor. Statute 6360-5 illustrates instances but I don't think it is all inclusive. There is no language in that which would make it all inclusive.

The Court: Which is that?

Mr. Dovell: The one counsel has cited.

Mr. Nelson: They were both enacted at the same time, your Honor. But, the laws of 1937, in Chapter 189, has one in section five and the other in section ninety-three.

The Court: Well, they must be read together then.

Mr. Dovell: Yes, your Honor. 6360-5 applies to all vehicles "except those not applicable" in certain instances and then goes on generally to speak of those instances. It says:

"Emergency vehicle exemptions and duties of caution—Road workers and [27] vehicles—Other specific exemptions."

That is the title: "Other specific exemptions."

The Court: I am going to have to examine that law further because I was relying on a specific section, the one defining an emergency vehicle.

So that I think you may go ahead and make your proof on the applicable facts, eliminating, of course, any detail on those things that have been admitted by our previous conference.

Mr. Nelson: Shall I make an opening statement, your Honor?

The Court: I don't think it is necessary, no.

Mr. Nelson: I would like to call Mr. Eldon Parke. [28]

ELDON PARKE

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Eldon Parke.

The Clerk: Will you spell your name, please?

The Witness: E-l-d-o-n P-a-r-k-e (spelling).

(Testimony of Eldon Parke.)

Direct Examination

By Mr. Nelson:

Q. Will you state your name, please?

A. Eldon Parke.

Q. By whom are you employed?

A. I am employed by the Washington State Patrol.

Q. I didn't hear you.

A. By the Washington State Patrol.

Q. By whom were you employed on the 9th of March, 1945?

A. By the Washington State Patrol.

Q. Where were your headquarters for your employment in March, 1945? A. In Vancouver.

Q. How long had you been stationed out of Vancouver on March 9, 1945?

A. October, 1942. I couldn't give you the exact date.

Q. You went there in October, 1942? [29]

A. Yes, sir.

Q. Mr. Parke, are you familiar with the intersection of Washington Street and Tenth Street in the City of Vancouver? A. I am.

Q. Do you know whether or not on March 9, 1945, Washington Street was an arterial street?

A. It was.

Q. Mr. Parke, will you state whether or not, or, rather, will you state what, if anything, out of the ordinary occurred on the 9th of March, 1945?

A. I was——

(Testimony of Eldon Parke.)

The Court: Just a moment. Washington Street is an arterial running north and south?

Mr. Nelson: Running north and south, your Honor, yes.

A. (Continuing): I was involved in a vehicle collision on that date.

Q. (By Mr. Nelson): Where?

A. On Tenth and Washington Streets, in the intersection, in Vancouver.

Q. Is this area of the City, the intersection of Tenth and Washington Streets, is that in the residential area or the business area, Mr. Parke?

A. That is in the business area. [30]

Q. What were you doing immediately prior to this accident?

A. I was driving south on Washington en route to the State Patrol Office at the foot of Washington Street in Vancouver.

Q. Were you at that time in your regular pursuit as a patrolman? A. I was.

Q. You were on duty? A. I was.

Q. What sort of car were you driving?

A. A 1942 Chevrolet two-door sedan.

Q. Belonging to whom?

A. The State Patrol.

Q. When you reached the intersection of Washington and Tenth Streets, at what speed were you going? A. About——

The Court: That is what time did you say it was?

Mr. Nelson: He hasn't testified to that.

(Testimony of Eldon Parke.)

The Witness: In the vicinity of four o'clock.

The Court: In the afternoon?

The Witness: Approximately. I couldn't say definitely.

Q. (By Mr. Nelson): At approximately four o'clock on the 9th of March, 1945, when you reached the intersection of Washington and Tenth Streets how fast were you going? [31]

A. It would be in the vicinity of twenty (20) miles an hour.

Q. Have you anything that would lead you—have you anything that fixes in your mind as to what makes you think you were going twenty miles an hour?

A. I had to stop at Ninth Street, or Eleventh, where there is a traffic light; stop and wait there and started up and was coming south. I think I had just gotten into high gear before I reached the intersection.

Q. Will you tell us what happened when you reached the intersection of Washington and Tenth Streets?

A. I entered the intersection and I heard a siren just after I entered the intersection and I looked to my left and there was a fire truck almost upon me. It—I don't have a good recollection—I got an impression it was going at a pretty good speed. It is an impression only. It seemed to be coming fast. It struck me almost simultaneously with my seeing it; struck the car, rather. I believe at the time that the collision occurred I was almost south

(Testimony of Eldon Parke.)

of the center of the intersection, because the fire truck, which was going west, was driving in the center of Tenth Street, or to the left of center, and it struck the left rear fender of the patrol car, and my recollection ceased then until I was sliding across the sidewalk out of the car. I don't know in the seconds intervening what took place.

Q. At what angle does Tenth Street intersect Washington Street? A. At right angles. [32]

Q. Mr. Parke, we have a diagram of a right angle intersection (indicating). Does that approximate the angle? Is that a fair representation of the angle at which Washington Street and Tenth Street intersect?

The Court: That will be marked and admitted as an exhibit. You may do that without removing it. Do you have any objection, Mr. Dovell?

Mr. Dovell: No.

The Court: And the witness may step down and mark upon it whereabouts the vehicles were in colored pencil.

(Whereupon, witness went to map on bulletin board.)

A. That seems to be a very good representation of it.

The Court: And that is drawn on the basis of the top being north and the bottom south?

Mr. Nelson: Yes, your Honor.

The Court: And the right east and the left west?

Mr. Nelson: Yes, sir.

(Testimony of Eldon Parke.)

The Court: And it is drawn to scale, is it?

Mr. Nelson: It is drawn on scale, your Honor.

The Court: Very well.

Q. (By Mr. Nelson): Now, Mr. Parke, you testified you were on Washington Street going south and that is a fair representation of the intersection of Washington Street and Tenth Street. Now, will you show us your position when you first knew the fire truck was there and the position [33] you were in which the fire truck struck you?

A. (Whereupon witness sketches upon map.)

Q. What does that represent?

A. I believe that that would be approximately my position when I saw the truck, and I don't think I had progressed—

The Court: I think you can identify that in some manner. Put your initials on there or anything else.

Mr. Nelson: By "1," your Honor?

(Whereupon witness identifies sketch upon map.)

A. (Continuing): I don't believe I progressed the length of the car. Probably I should put that down here (indicating).

Q. (By Mr. Nelson): Make that a little heavier, please, Mr. Parke.

A. I probably progressed about that far when the collision occurred.

Q. And he hit what part of your car?

A. The left rear fender.

(Testimony of Eldon Parke.)

Q. And what do you recall happened after that?

A. My next recollection is I was out of the car and sliding across the sidewalk.

Q. Where was that?

A. It would be off the drawing here (indicating), further out than this is, on this side of the street. There was at that time a used car lot in here. I slid across the sidewalk here into the used car lot at about that location (indicating). [34]

Q. What is the first thing you remember after that?

A. Well, I raised up on my elbows. My leg—I couldn't get up. The fire truck was then turning the next corner over here, south (indicating).

Q. Do you know where your car was at that time?

A. It was almost directly east of me; almost parked at the curb, in very close alignment with the curb, at an angle about fifteen degrees away from the curb.

Q. Do you know how you got out of the car?

A. No.

Q. Do you remember anything that took place from the time you left the car until you found yourself at rest on the ground?

A. I recall the sliding.

The Court: You say the car had come to a stop directly east of you?

The Witness: Yes, sir. It was—it looked as though it had been parked.

The Court: And you were where?

(Testimony of Eldon Parke.)

The Witness: I was laying in this used car lot.

The Court: I get it.

Mr. Nelson: You may take the stand.

(Whereupon, witness resumed witness chair.)

Q. (By Mr. Nelson): What happened immediately after that, Mr. Parke?

A. Well, there was some stranger, passerby, who attempted [35] to straighten out my leg, and I wouldn't permit him to until someone arrived that was at least familiar with first aid, and I believe it was this man that first came there that called an ambulance and notified the State patrol I had been in an accident.

Q. Did the ambulance pick you up?

A. Very shortly; in a few minutes.

Q. Where did they take you?

A. To the Permanente Hospital.

Q. Do you know your injuries?

A. Fracture of the right femur, in the right hip joint; and a fracture of a bone in the arm here (indicating). I can't give you the medical name for that one. And, injuries to both knees and back of my head and hands and forehead.

Q. How long were you in the hospital?

A. Intermittently from the 9th of March until about the first of October. I couldn't give you the right dates.

Q. You say intermittently?

A. I was in for one month the first time and then I went home for a week and then I went back

(Testimony of Eldon Parke.)

to the hospital. I wasn't well enough to stay at home and I came back again and came home again, I should say, on the first of July. I believe the month of July I spent at home, and I was back to the hospital again for a couple of months longer.

Q. Did you pay for your hospital bills?

A. No, sir. [36]

Q. Did you or did you not assign your claim against the person who injured you to the State of Washington? A. I did.

Q. Do you know whether or not the State of Washington paid your bills?

A. I believe they did. I never witnessed any transactions to that effect.

Q. Have you ever received a bill for any treatment? A. No. I never received any bills.

Mr. Nelson: You may cross-examine.

The Court: I have a question. This claim was made against the United States and not the driver of the truck?

The Witness: I don't recollect what it was, but I had the right to either, as I understand it, collect from whoever injured me or to collect from the Labor and Industries Department.

The Court: But this is a special action where you are not seeking to collect from the driver of the truck but the United States Government itself?

The Witness: I understand the action is against the Government of the United States.

The Court: I am assuming that this assignment of the claim is against the United States?

(Testimony of Eldon Parke.)

Mr. Nelson: Yes, your Honor.

The Court: Rather than the operator of the vehicle. I ask that because the statute is very clear that if you elect to hold the [37] operator of the car you can't sue the Government, and, if you sue the Government you can't sue the operator of the vehicle.

The Clerk: Plaintiffs' Exhibits 1 and 2 marked for identification.

(Plaintiffs' Exhibits Numbers 1 and 2 marked for identification.)

(Documents handed to Counsel for Defendant.)

The Court: While Mr. Dovell is examining that I want to ask you, are any of those streets stop streets as far as lights are concerned, or signs on the street corners?

The Witness: There was at that time, I believe, a stop button on the pavement, about where they figure Tenth is there, on both sides of that intersection, and it would be in the same position on the other side.

The Court: But there was no stop sign at the corner?

The Witness: That I couldn't say either way, your Honor.

The Court: Now, had you already entered the intersection, you say, when this fire truck appeared in sight?

(Testimony of Eldon Parke.)

The Witness: Yes, sir.

The Court: And had you heard the siren before you came into the intersection?

The Witness: No.

The Court: Then the fire truck—would you care to estimate the speed of it at all? [38]

The Witness: No, sir; I couldn't answer that one. I had a fleeting impression that it was coming fast.

The Court: How far did it travel after the collision?

The Witness: Well, it never stopped to my knowledge.

The Court: They never came to a stop at all? You never saw them again?

The Witness: No, sir. When I was lying in the used car lot and I raised up, there he was, turning the intersection—making a turn to the west of this one.

The Court: Was the siren sounding then?

The Witness: I didn't hear it, sir.

The Court: That is all. I just wanted to get that clear.

Cross-Examination

By Mr. Dovell:

Q. Mr. Parke, you say that when you were here (indicating) you first heard the siren in this position (indicating) number one?

A. No, I believe that is when I first saw the truck. When I first heard it, it would have been two hundred feet north of there.

(Testimony of Eldon Parke.)

Q. Farther this way? A. Yes, sir.

Q. Then what did you do when you first heard this siren?

A. I looked to see where it was coming from, to locate it.

Q. You didn't move, then, to the side and park?

A. No. [39]

Redirect Examination

By Mr. Nelson:

Q. Mr. Parke, how much time interval was there from the time you first heard a siren until you were struck by the truck?

A. It would have been a matter of a very few seconds; just seconds of time.

Mr. Nelson: That is all.

(Whereupon witness was excused.)

Mr. Nelson: Your Honor, I offer in evidence what has been marked as Plaintiffs' Exhibits 1 and 2.

The Court: What are they?

Mr. Nelson: 1 is proof that Washington Street, upon the date of this accident, was duly designated by the Director of Highways for the State of Washington as an arterial highway. 2 is a duly authenticated copy of the assignment of Mr. Eldon Parke of his action against the United States Government to the State of Washington.

The Court: I assume you have no objection, Mr. Dovell?

Mr. Dovell: No, your Honor.

The Court: They will be admitted.

The Clerk: Plaintiffs' Exhibits 1 and 2 admitted in evidence.

The Court: I think the map will be 1.

The Clerk: You want that number 1?

The Court: Yes. [40]

The Clerk: Then these will have to be numbers 2 and 3.

(Plaintiffs' Exhibits Numbers 1, 2 and 3 marked for identification and received in evidence.)

Mr. Nelson: I would like to call Mr. Ross Kinsey, your Honor. [41]

ROSS D. KINSEY

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Ross D. Kinsey.

Direct Examination

By Mr. Nelson:

Q. Will you state your name, please?

A. Ross D. Kinsey.

Q. Where do you live, Mr. Kinsey?

A. Vancouver, Washington.

Q. Where did you live on the 9th day of March, 1945?

A. Vancouver, Washington.

(Testimony of Ross D. Kinsey.)

Q. Did you hear the witness who preceded you testify? A. Yes, sir.

Q. State whether or not you witnessed any part of the accident which he related.

A. Yes, sir. I witnessed the accident between the fire engine and the State Patrol car.

Q. Where were you immediately preceding the accident?

A. I was just coming out of the Elks Club on Tenth Street.

Q. Will you come over to this drawing which is a drawing of the intersection at Tenth and Washington Streets?

(Whereupon witness went to map on bulletin board.) [42]

You notice that north is to the top, south to the bottom, west to the left and east to the right. Show the Court approximately where you were when you came out of the Elks Club.

A. Well, the Elks Club sits back about one-third of the way from the corner in the block.

Q. When you came out of the Elks Club, what did you observe?

A. When I first came out I heard the siren and looked back east on Tenth.

Q. What direction is that on this drawing?

A. In this direction. (Indicating.)

Q. Yes?

A. And saw a fire truck coming out on Tenth Street and I watched it proceed down Tenth Street.

(Testimony of Ross D. Kinsey.)

Q. What did you notice about the fire truck?

A. He had his siren on, and the thing most noticeable to me is that when he came across Broadway and Main he came without any appreciable or noticeable slowing down, and then to the intersection of Washington.

Q. Now, where is Main Street in relation to the drawing? A. East.

Q. Does it run parallel to Washington Street?

A. Yes.

Q. Approximately how fast do you think this fire truck was going? [43]

A. It would be hard for me to judge, not being an expert in that matter, and a fire truck is large and noisy, but I would say he was perhaps in the range of twenty-five (25) or thirty (30) miles an hour.

Q. Did you observe him as he reached this intersection?

A. Yes, sir. By the time he reached this intersection I had proceeded on down west on Tenth near the corner.

Q. Did he stop when he got to the intersection?

A. No, sir.

Q. Go ahead.

A. I was standing by there when he came into the intersection and I noticed—after he entered the intersection is when I noticed the State Patrol car. I didn't before because I was watching the fire truck. They met in this vicinity. (Indicating.)

(Testimony of Ross D. Kinsey.)

Q. Will you take a pencil and draw where you think they met?

A. Well, I would say they met——

Q. Can you draw the fire truck on there too, please?

(Witness sketches on map.)

Q. (Continuing): Put your initials on those drawings, please. What occurred after the collision?

A. As I recall it, the fire truck—or State Patrol car—at the time this all happened there was quite a hub-bub and I couldn't tell you which way the State Patrol car flew, but the eventual windup was the patrol car was sitting here and the fire truck was here, and the fire truck backed off and proceeded west on Tenth.

Q. How long did the fire truck stay there? [44]

A. As I recall he didn't any more than get stopped and reversed and stopped and took off down.

Q. Did you see the highway patrolman?

A. I walked across Washington Street and the patrolman was here (indicating) and was being put on a stretcher. The ambulance had arrived before I crossed Washington Street.

Q. At the time of this collision did you notice any other vehicles on Washington Street?

A. I had a dim recollection of another automobile proceeding north.

Mr. Nelson: That is all. You may cross-examine.

(Testimony of Ross D. Kinsey.)

Cross-Examination

By Mr. Dovell:

Q. Did you ever watch any fire truck movements before across there?

The Court: A little louder, Mr. Dovell.

Q. (By Mr. Dovell): Have you ever watched a fire truck go across that intersection at any time?

A. I don't recall that I ever watched a fire truck proceed across Washington at that particular place, but I have witnessed fire trucks in Vancouver.

Q. You saw them coming out of the Barracks on Tenth Street?

A. Yes, sir. When I first noticed the fire truck he was [45] pulling out of the Tenth Street gate to the Vancouver Barracks.

Q. Now, Reserve Street is northeast and southwest at an angle by the Barracks and he was coming across Reserve. Did you notice the siren——

A. Yes.

Q. (Continuing): ——and/or the light?

A. Yes, sir. Just a second, I wouldn't say he had a red light on. I saw the engine; heard the siren.

The Court: How far back are these Barracks? How many blocks back from the place where the accident occurred?

The Witness: One—two and a fraction.

The Court: A little over two blocks?

The Witness: Yes, sir.

Q. (By Mr. Dovell): And in the intersection, the only car then was another car going north besides the patrol car?

(Testimony of Ross D. Kinsey.)

A. I saw a car proceeding north, which would have been past the intersection, but I didn't see the patrol car until the crash.

Q. And you didn't see any other vehicle?

A. Just the one.

Q. And you didn't see what became of that car, whether it pulled off to the side?

A. No, sir.

Mr. Dovell: That is all.

The Court: Well, Mr. Kinsey, as you have [46] pictured the cars at the point of collision, you have the fire truck on the wrong side of the street. Is that what you intend? South of the center? It should have been traveling, if it traveled west, north of what would be the center line.

The Witness: As I recall it, your Honor, when the accident took place, they were south of the center of the intersection—south of the center of the intersection.

The Court: The fire truck was on its wrong side at the time?

The Witness: It would have had to have been, sir.

The Court: Well, was the patrol car on its wrong side of the street?

The Witness: As I recall, the patrol car was in the far lane or his side of the street.

The Court: And did you notice the fire truck making a turn in the intersection or did it come up the street on the wrong side?

The Witness: As I recall it, down Tenth the fire engine stayed to his side of the street. I didn't pay

(Testimony of Ross D. Kinsey.)

any attention to that at the time, but had he been on the wrong side of the street, I think it would have remained in my mind.

The Court: Well, the way you have drawn this illustration on that plat, if he remained on his own side of the street, there wouldn't have been any collision because the patrol car would have been through.

The Witness: Well, it is my impression that at the [47] time the fire truck saw the patrolman, he tried to swing to avoid him. Now that is my impression.

The Court: Do you know what part of the patrol car was struck?

The Witness: He struck, I would say, the rear half of it.

The Court: The rear left side?

The Witness: Well, it would have had to be the left side, yes, sir.

The Court: In back of the center of the patrol car?

The Witness: Well, when I saw—when it struck, I would say it was the back half. Now, I wouldn't say whether it was beyond the center line or not.

The Court: And then you say he came to a stop afterwards?

The Witness: And when the patrol car came to rest here, the fire truck was headed into him and he stopped and backed up and proceeded down Tenth Street.

(Testimony of Ross D. Kinsey.)

The Court: Did you notice any marks on the pavement; any tire marks?

The Witness: No, sir. I didn't notice or look for any.

The Court: That is all.

Q. (By Mr. Dovell): Mr. Kinsey, how far south of the intersection would you estimate it that the accident occurred? How many feet? [48]

A. Well, that is a ticklish question, but as I recall it, when they came together they were south of the center line of the intersection and veered off. Whether it happened at the time of the impact or whether the fire engine swung this way to avoid him, I don't know, but one way or another—perhaps by the nature of the impact—they came together at this point.

Q. But you are not really sure that the impact itself took place below the center line, are you? You are not positive on that, are you?

A. No, sir, I am not positive; but that is my impression.

Mr. Dovell: That is all.

Mr. Nelson: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: I would like to call Arnold Kurtz, your Honor. [49]

ARNOLD KURTZ

called as a witness for and on behalf of Plaintiffs,
upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record,
please.

The Witness: Arnold Kurtz, K-u-r-t-z (spelling).

Direct Examination

Q. (By Mr. Nelson): Where do you live, Mr.
Kurtz? A. Portland.

Q. Where are you employed?

A. Vancouver; Ford Agency in Vancouver.

Q. Washington? A. Washington.

Q. And on the 9th of March, 1945, where were
you employed, Mr. Kurtz?

A. At the Ford Agency at Tenth and Washing-
ton in Vancouver.

Q. You have heard these two witnesses speak of
an accident which occurred at the intersection of
Tenth and Washington Streets in Vancouver, Wash-
ington, on the 9th of March, 1945. Do you know
anything, of your own knowledge, of that accident?

A. Yes, I do.

Q. Will you tell us what you know about it, Mr.
Kurtz?

The Court: Let me suggest that he tell the [50]
Court where his place of business is. He said Tenth
and Washington. Which one of those four corners?
The top is north and the right is east and so on.

(Whereupon the witness went to map on bul-
letin board.)

(Testimony of Arnold Kurtz.)

Q. (By Mr. Nelson): North, east, south and west (indicating directions).

A. Right here. (Indicating.)

Q. What business is that, Mr. Kurtz?

A. Ford Agency.

The Court: On the northwest corner?

The Witness: Yes.

The Court: Of the intersection.

Q. (By Mr. Nelson): How did you happen to observe this accident, Mr. Kurtz?

A. This is north, south, east and west (indicating)?

Q. Yes. How did you happen to observe the accident?

A. I was standing in the window at the time.

Q. Did you hear a siren? A. Yes, I did.

Q. Just what did you observe, Mr. Kurtz?

A. I observed this fire engine.

Q. Where was the fire engine when you first heard the siren; do you know?

A. I don't know. Where has this fellow got the Elks Club? [51] About in here.

Q. Describe what you saw, please?

A. It was coming down towards Washington Street.

Q. Can you give us any idea how fast he was going?

A. I would say twenty-five (25) miles an hour.

Q. Was he sounding his siren? A. Yes.

Q. Go ahead and describe what happened?

A. I saw him. He was coming down about the

(Testimony of Arnold Kurtz.)

center of the block, and when he got to Tenth Street here, of course from my position in the window I couldn't see the state patrol car, but when he came into the intersection I saw him making a turn to the left, and saw the State Patrol car and saw them both hit about in this vicinity.

Q. What happened then?

A. The Government truck put him over on this curb.

Q. Did you observe what happened to the State patrolman? A. No, I didn't.

Q. Where was the fire truck now, after the accident?

A. The fire truck was heading this way.

Q. And what did he do after the accident?

A. He backed up and went down Tenth.

Q. Did you see how far he went on Tenth?

A. Yes.

Q. How far did he go?

A. One block and turned left. [52]

Q. Did he still sound his siren?

A. He still sounded his siren in the middle between Washington and Columbia.

Mr. Nelson: You may cross-examine.

Cross-Examination

Q. (By Mr. Dovell): Did you see a red light on the fire truck? A. No, I don't recall.

Q. But you recall the siren?

A. I recall the siren.

(Testimony of Arnold Kurtz.)

Q. Was that sound loud?

A. No, it wasn't awfully loud.

Q. Just a fire siren, an ordinary fire truck siren?

A. Just like a fire truck siren.

Mr. Dovell: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: Your Honor, these people live in Vancouver. I wonder if it would be possible for the ones who testified to be excused?

The Court: Yes, they will be excused. What was Mr. Kurtz's business?

Mr. Kurtz: Ford agency.

The Court: Mr. Kinsey, what is your business?

Mr. Kinsey: Motion picture projector.

The Court: All right. [53]

ELMER E. NELSON

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Elmer E. Nelson.

Direct Examination

Q. (By Mr. Nelson): Mr. Nelson, you have heard these witnesses testify as to an accident which occurred on the intersection of Tenth and Washington Streets in the City of Vancouver, on March 9, 1945?

A. I have.

Q. Do you know of your own personal knowledge anything about this accident?

(Testimony of Elmer E. Nelson.)

A. I seen the fire engine when it went past me.

Q. Will you come over here and point out on this drawing, which is a drawing of the intersection of Washington and Tenth—this is north, south, east and west. (Indicating.)

(Whereupon witness went to map on bulletin board.)

The Court: Mr. Nelson, what is your occupation?

The Witness: I am owner and operator of a service station.

The Court: On one of these four corners?

The Witness: No. I was back about half way into the next block east of this intersection on the north side of the block, or street. [54]

Q. (By Mr. Nelson): Now, let me get this straight. You mean it is a street running parallel to Washington Street to the right?

A. Main Street runs north and south the same as Washington and Tenth runs between Main and Washington.

Q. Were you on Main Street?

A. No. Between Washington and Main on the north side.

The Court: On the north side of Tenth Street?

The Witness: Yes, sir.

Q. (By Mr. Nelson): What did you observe?

A. I observed the fire engine as it went past and the siren was going and I just got out of my car as the fire engine went by. It was going approximately thirty (30) miles an hour; and I would say “ap-

(Testimony of Elmer E. Nelson.)

proximately'' because a fire engine, army color, is kind of hard to observe at best. But, I seen the tail end of the fire engine here and I didn't see him any more but I heard the collision. I proceeded on west to Washington Street and the fire engine had already gone on, and I came to where the State patrolman was and where his car was located.

Q. Did you see the fire truck leave after the crash?

A. No, I didn't see him leave because I was obstructed by the other traffic that came by right behind the fire engine.

Q. Where was the State Patrol car when you reached the intersection there?

A. When I reached the intersection here the State Patrol [55] car was about, I would say, between fifty (50) and sixty (60) feet south of the southwest corner and it was bumped up against the curb and in the rear of another car. The doors was open and I do remember of seeing someone take part of the State Patrolman's radio up back in the street, but I wouldn't say how far because I seen them with part of the radio in their hand.

Q. Do you remember noticing on the State Patrol car where it had been hit?

A. The State Patrol car had been hit on the left rear fender almost directly on the left rear wheel. The center of it.

Mr. Nelson: You may cross-examine

(Testimony of Elmer E. Nelson.)

Cross-Examination

Q. (By Mr. Dovell): You were standing about the middle, between Main and Washington, on the north side of Tenth? A. Yes, sir.

Q. Now, in connection with your position, where was the fire truck traveling when you saw it?

A. The fire truck was traveling more towards the center of the street.

The Court: Well, was it north or south of the center?

The Witness: Well, I would say it was almost right due in the center.

The Court: It was partly on the wrong side of the street? [56]

The Witness: Yes, at that time.

The Court: Is that what you mean?

The Witness: Yes, sir.

Q. (By Mr. Dovell): You wouldn't be sure, though, that it was on the wrong side of the street, would you?

A. Well, I remember back that there was a car parked just behind, or sort of behind, me in a double parked position so that would automatically make the fire engine go over past the center of the street.

Mr. Dovell: That is all.

The Court: Did you notice, out in the intersection after the accident, where these cars came together?

The Witness: No, I didn't.

(Testimony of Elmer E. Nelson.)

The Court: You didn't see any broken glass or anything else that showed a point of contact?

The Witness: No, your Honor.

Redirect Examination

Q. (By Mr. Nelson): Where was it that the piece of radio equipment was picked up?

A. I don't know. When I noticed the radio equipment being picked up the party was almost at the vehicle.

The Court: On the southwest corner?

The Witness: That would be the southwest [57] corner. The State Patrolman had gone across the sidewalk and was lying on his back up against, or underneath—partially underneath—a used car in that used car lot.

Mr. Nelson: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: If your Honor please, in the regular file there should be three depositions.

The Court: I haven't the file. (File handed to Court.) There apparently are some depositions. And some depositions on the part of the Defendant also.

Mr. Nelson: Those depositions have to do with the amount of money expended by the State of Washington on this accident. They don't deal with anything else, do they?

Mr. Parr: No. Shall we read them to your Honor?

The Court: Unless Mr. Dovell insists. I thought you could stipulate.

Mr. Dovell: We stipulate on the amounts of damages, but, of course, the witness for Defendant is not in that regard. But, it is a very short deposition.

Mr. Parr: There are three for the Plaintiffs, mainly on the amount expended.

The Court: Well, I will let you read them into the record, but I think I will let you wait until tomorrow.

Mr. Dovell: Your Honor, I have one witness from Vancouver who would like to get back home and I would like to present [58] his evidence this evening.

The Court: Very well. It is late, but I will let you call him out of order without prejudicing the rights of Plaintiffs.

Mr. Nelson: Thank you, your Honor. With the exception of the depositions, the Plaintiffs rest.

Mr. Dovell: Thank you, your Honor. [59]

CLARENCE B. NELSON

called as a witness for and on behalf of Defendant, upon being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Clarence B. Nelson.

Direct Examination

By Mr. Dovell:

Q. Mr. Nelson, where did you live or reside on March 9, 1945?

(Testimony of Clarence B. Nelson.)

A. I resided at the Central Fire Station, Vancouver Barracks.

Q. What were your duties there?

A. Truck driver in the fire department.

Q. Do you recall receiving a call to move the fire truck on that date? A. Yes.

Q. Will you explain in regard to that what your duties were?

A. This call came from the City of Vancouver through our switch board in the fire station and the operator on the switch board dispatched the truck out on the call. I was the driver. There were two (2) men with me on the truck.

Q. And what are their names?

A. Valdez and Cornell.

Q. Was this under any agreement with the City or why were you called? [60]

A. Yes, it was. There had been a verbal agreement for fifteen (15) years at the time I was there that the City and Vancouver Barracks would help each other out in emergency cases.

Q. And what did you understand you were to do on this call?

A. Well, to take the fire truck and go down to the City of Vancouver. They had a route picked out to go.

Q. What route was that?

A. Out the Barracks to the Tenth Street gate and down Tenth Street, across Tenth and Washington, then Columbia and turn left to Eighth and back one-half block on Eighth to the fire station.

(Testimony of Clarence B. Nelson.)

We were to proceed from the fire station to the Tenth Street gate without the siren and red light. After we got outside the reservation we used the red light and siren.

Q. I didn't hear.

A. We were to proceed from the fire station to the entrance, Tenth Street entrance, without the siren or red light and outside the military reservation we were to use the siren and red light.

Q. What did you do then? Describe your trip from the time you reached the city limits of Vancouver.

A. Well, we came out of the Tenth Street entrance.

The Court: Well now, how far was this Tenth Street entrance from the intersection shown here? How many blocks?

The Witness: Approximately five (5) [61] blocks.

Q. (By Mr. Dovell): Now, when you started down Tenth Street, what did you do, and what direction did you take?

A. We proceeded west on Tenth Street.

Q. What side of Tenth Street?

A. Right side.

Q. And did you sound your siren?

A. Yes. And also the red light. They are both on the same control. The siren and red light are together.

Q. Describe then what you saw as you approached Washington.

A. Well, the visibility was fair.

(Testimony of Clarence B. Nelson.)

Q. Was it raining?

A. It was misting; yes, a little. I didn't see the State Patrol car until I was right upon it.

Q. You had already entered the intersection without seeing the patrol car? A. Yes.

Q. And describe just what happened then.

A. Well, as I recall it, we hit the State Patrol car on the left rear fender and it spun the State Patrol car out of my way and I proceeded on through the intersection without backing up.

Q. You didn't have to back up? A. No.

Q. How fast were you going before you reached Washington [62] Street?

A. Approximately thirty (30) miles an hour. When I came to the intersection of Tenth and Washington I knew there was a stop sign and I slowed down to approximately twenty-five (25) miles an hour and applied my brakes when I saw the patrol car.

Q. Did you make any turn in the intersection?

A. Not that I recall, no. I cleared the patrol car out of the way and stopped as I—on the other side of the intersection. I stopped momentarily and I looked back. As I stopped all I saw was the patrolman going out of the car. My first impression after that was to proceed to the fire department at the City Fire Station, and, as soon as I arrived at the City Fire Station, I dispatched the ambulance out to pick up the patrolman.

Q. Did you see the driver of the patrol car after the accident at any time?

(Testimony of Clarence B. Nelson.)

A. Yes, two days after out at Northern Permanente Hospital.

Q. Did you have any conversation with him?

A. Yes.

Q. Did he make any statement to you?

A. The statement, as I recall, was he stated he heard the siren but didn't know where it was coming from.

Q. There wasn't anything said about not parking off to the right? A. No. [63]

Q. Now, when you reached the Vancouver City Fire Station, did they require you to answer to a fire call from there?

A. Yes. The only time—our truck was dispatched down there was when the City of Vancouver had all their apparatus out on a fire and we were called on an emergency stand-by in case another fire broke out. If that was the case we would have to dispatch another fire truck from the Vancouver Barracks in place of one already out.

Q. What were your orders after you would leave the Vancouver Fire Station to return to your Barracks? What would your orders be then?

A. To proceed back under normal conditions without the siren.

Q. Had you ever made a run like this before?

A. Yes, frequently.

Q. Did you make it under the same conditions?

A. Yes.

Q. In making this run did you ever stop at any stop signs?

(Testimony of Clarence B. Nelson.)

A. Not that I recall. We would slow down and then proceed.

Q. Did you have any accidents before?

A. Any accidents before?

Q. In that regard? A. No.

Mr. Dovell: You may cross-examine.

The Court: Before you do that, I wish Mr. Nelson [64] would step down and see if he agrees with any of the drawings down there as to point of collision of the two vehicles.

(Whereupon witness steps to map on bulletin board.)

The Witness: I agree with Mr. Parke's drawing here.

The Court: That is the State patrolman's?

The Witness: Yes.

Q. (By Mr. Dovell): What do you mean you agree? In what way?

A. That he was hit approximately here and not down here, as I recall it.

Q. Do you mean that you agree with his position of number one or number two?

A. It was approximately between number one and number two position.

The Court: Well, number one and number two, Mr. Dovell, overlap, do they not? Number one is the vehicle as when he first heard the siren or saw you approaching and number two is where it had moved when contact was had. That was the witness Parke's testimony, as I recall it.

(Testimony of Clarence B. Nelson.)

Mr. Nelson (Counsel for Plaintiffs): That is right.

Mr. Dovell: I would know, your Honor, whether Mr. Nelson (witness) saw Mr. Parke's diagram or not. He was sitting back here.

The Witness: I saw it. I have had plenty of instruction in driving. [65]

The Court: I can't hear.

The Witness: We were instructed on driving a fire truck long enough to know not to drive on the wrong side of the street. I was on the right side of the street.

The Court: And you were part of the military personnel at that time, were you?

The Witness: Yes, your Honor.

Q. (By Mr. Dovell): What are you engaged in now?

A. I work for the Veterans Administration.

The Court: That is all. You may take the stand again.

Mr. Nelson (Counsel for Plaintiffs): While he is here I would like to ask a question, if I may.

Cross-Examination

By Mr. Nelson:

Q. Mr. Nelson, point out where Mr. Parke's car was at the time you hit him.

A. Approximately between number one and number two on this diagram.

Q. All right. Now approximately where was Mr. Parke's car when it came to rest?

(Testimony of Clarence B. Nelson.)

A. Approximately on the southwest corner.

Q. And where was the fire truck when it came to rest?

A. Approximately over here, cleared of the intersection. [66]

Q. Before you started continuing on your trip, did you reverse and back up? A. No.

Q. You didn't back up?

A. No. When I hit the patrol car it spun it out of my way and I stopped across the intersection.

Q. How long did you stop there?

A. Half a minute, more or less.

Q. Why did you stop there?

A. It is hard to explain. I stopped there, turned around to look, and saw the patrolman flying out of his car, and then it was my impression to go down to the fire station.

Mr. Nelson (Counsel for Plaintiffs): You may take your seat here.

(Whereupon witness resumed witness chair).

Q. (By Mr. Nelson): Mr. Nelson, at the time you received the message at the fire house to take the fire truck out of this Army fire house, you did not think at that time that you were going to a fire, did you?

A. I knew I wasn't going to a fire. It was stand-by.

Q. You knew that you were going to the Vancouver Fire Station to stand by? A. Yes.

Q. Now, when you got your truck to the Van-

(Testimony of Clarence B. Nelson.)

couver Fire Station, you testified you had done this quite a few times, you had then [67] to put the fire truck inside the fire house? A. Yes.

Q. Did you park inside?

A. Inside the fire house facing outwards.

Q. I presume so that you could take off at a moment's notice? A. Yes.

The Court: The City's fire truck was out answering a call at that time?

The Witness: Yes, sir; all of their equipment.

Q. (By Mr. Nelson): Mr. Nelson, at the time you hit Mr. Parke's car, what was the estimate of your speed?

A. Approximately twenty-five (25) miles an hour.

Q. You did not, of course, stop when you got to the intersection of Tenth and Washington Streets?

A. No.

Q. Did you look in either direction to see whether there were vehicles that you might run into?

A. I don't remember.

Mr. Nelson: That is all, your Honor.

The Court: Anything further, Mr. Dovell?

Mr. Dovell: I believe not, your Honor.

The Court: That is all, Mr. Nelson.

(Whereupon the witness was excused.) [68]

The Court: Now I think we will take an adjournment until ten o'clock tomorrow morning, and you can put your depositions in evidence and the

Government can put in what further evidence they have.

(Whereupon, at 4:40 o'clock p.m., December 18, 1950, proceedings in the within-entitled and numbered cause were adjourned until 10:00 o'clock a.m. December 19, 1950, at which time the following proceedings were had, to wit:) [69]

December 19, 1950, 10:00 A.M.

(Counsel heretofore noted, excepting C. R. Nelson, Esq., being present, the following proceedings were had.)

The Court: Docket 1326, State of Washington vs. United States of America. You may proceed.

Mr. Parr: If the Court please, we have a brief of some eight pages that I would like to submit to the Court. Your Honor, Mr. Nelson has your Honor's original and another copy. I have my own copy. I expected him here. I don't understand why he is not here.

The Court: Well, you probably want to use your brief in making your argument.

Mr. Parr: Yes, if the Court please.

The Court: These trial briefs are of little value to the Court if they come at the last moment; but, if there is anything unique in your argument that indicates doubt in the mind of the Court that I feel I want to examine it more closely, why I will do so.

Mr. Parr: We have, in this brief, summarized the State's case and we have also summarized a number of Federal Court cases that have been

tried on this same question as to whether or not this was an emergency or not an emergency.

The Court: Well, I will be glad to let you submit that; and isn't there further evidence you want to offer? Didn't you have some depositions?

Mr. Parr: Yes, if the Court please, and this plat we [70] would like to offer as an exhibit just to show the testimony, or accompany the testimony of——

The Court: Yes. It was admitted yesterday, Mr. Parr.

Mr. Parr: And the depositions are all in the files, if the Court please.

Mr. Dovell: Do you want to read the questions or answers?

Mr. Parr: Either way.

(Whereupon, C. R. Nelson, Esq., appeared and was present during the following proceedings, to wit.)

Mr. Dovell: How many are there?

Mr. Parr: There are three depositions. Yes, Dr. Dwyer, Dr. Lucas, and Mr. Hamby.

Mr. Dovell: And I have one.

Mr. Parr: Should I read answers and you the questions?

Mr. Dovell: Yes.

(Whereupon, Mr. Parr assumed the witness chair.)

Mr. Dovell: These are the interrogatories ad-

dressed to Mr. Rex Hamby. You have the answers?
Mr. Parr: Yes.

(Whereupon, the following interrogatories and answers thereto were read by Mr. Dovell and Mr. Parr, respectively.) [71]

REX C. HAMBY

having been called to appear before Donald G. Simpson, a Notary Public in and for the State of Washington, residing at Vancouver, Washington, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Please state your name?

A. Rex C. Hamby.

Q. What official position, if any, do you hold with the Northern Permanente Foundation—Northern Permanente Hospital?

A. Business Manager and Assistant Treasurer.

Q. Did you hold that position on or about March 9, 1945? A. No.

Q. Who has custody of the books of accounts showing payments of the inmates of the hospital?

A. Immediate custody of the books of accounts is with Berniece Oswald, Chief Accountant; official custody is with me as Business Manager. Berniece Oswald is directly under my supervision.

Q. Have you the original records of time and care at your hospital of Eldon Parke?

A. Yes.

Q. Referring to those records would you kindly

(Deposition of Rex C. Hamby.)

tell us when Eldon Parke first came to your hospital? [72] A. March 9, 1945.

Q. How long did he stay at the hospital for treatment?

A. Intermittently until October 24, 1945, for a total of 156 days in the hospital.

Q. When did he leave the first time?

A. April 5, 1945.

Q. Did he return after that time? A. Yes.

Q. Please state the date he returned?

A. April 24, 1945.

Q. How long was he in the hospital this second time? A. Until July 5, 1945.

Q. Please state any other time that he left the hospital and then came back?

A. He left on July 5, 1945, and returned July 29, 1945, and stayed until October 24, 1945.

Q. Who was the Doctor that attended him at first? A. Dr. F. J. Dwyer.

Q. What other Doctor attended him while at the hospital?

A. Dr. Walter Noehren, Dr. E. W. Saward, Dr. E. V. King, Dr. M. Ruzicka, Dr. Leo S. Lucas, and Dr. J. C. Woodward, Jr.

Q. Was any hospital equipment used in his treatment?

A. Yes, hospital bed, X-ray machine and laboratory equipment. [73]

Q. What charges were made for the use of this equipment?

(Deposition of Rex C. Hamby.)

A. For X-ray and laboratory equipment, \$231.50. Charges for other equipment such as beds were included in daily hospital ward rates which generally cover room, board and nursing care.

Q. How much were the payments that were made to you for the services the hospital rendered to Mr. Parke?

A. Total payments made for the services the hospital rendered to Mr. Parke were \$1,638.96, including physicians services billed through the hospital in the amount of \$300.00.

Q. Who made these payments?

A. State of Washington, Department of Labor and Industries.

Q. Were the payments made all at one time?

A. No, they were not.

Q. If they were not made at one time, will you state when they were made?

A. On June 20, 1945, we received \$24.00; on October 20, 1945, \$1,123.20; on November 20, 1945, \$461.76; on January 20, 1946, \$20.00; on February 20, 1946, \$10.00.

Q. What was the total amount that the Department of Labor and Industries paid to your hospital for the care, medical treatment and services rendered to Mr. Parke? A. \$1,638.96.

Q. What was the total of all——

Mr. Dovell: You remember we struck that last interrogatory out? [74]

Mr. Parr: Yes.

(Deposition of Rex C. Hamby.)

Mr. Dovell: I think there were some cross-interrogatories also.

Q. Were the charges you have stated in answer to direct interrogatory number sixteen made at the usual rate charged other patients for similar services by your hospital? And, if not, state why not and the difference in charges, if any?

A. Laboratory and X-ray charges were made at the usual rate charged other patients for similar services by my hospital.

Q. Please answer the foregoing question as to direct interrogatory number seventeen?

A. No. The ward rate charged Mr. Parke was \$5.50 per day; and the usual ward rate was \$6.00 per day. Some charges for medicine were less than the usual rates. No charges to Mr. Parke were in excess of the usual rate. The reason for the lesser charges indicated was to conform to the rates established by the state for such services.

Mr. Parr: Dr. Dwyer is next. [75]

FRANCIS J. DWYER

having been called to appear before Josef Zelasko, a Notary Public in and for the State of Washington, residing at Aberdeen, Washington, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Will you please state your name?

A. Francis J. Dwyer.

Q. Where do you reside at this time?

A. Aberdeen, Washington.

(Deposition of Francis J. Dwyer.)

Q. What is your profession?

A. Orthopedic physician and surgeon.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Washington?

A. Yes.

Q. In what branch of medicine do you specialize? A. Orthopedics.

Q. Doctor, have you, at any time, been in charge of a portion of the Northern Permanente Hospital? A. Yes.

Q. What portion of specialty in the hospital were you in charge of?

A. Orthopedic Department.

Q. Do you know Eldon J. Parke?

A. Yes. [76]

Q. Has he ever been your patient?

A. Yes.

Q. When was that, Doctor?

A. I first saw Mr. Parke March 9, 1945.

Q. Where were you at that time?

A. Vancouver, Washington.

Q. When did you first see Mr. Parke as a patient at the Northern Permanente Hospital?

A. March 9, 1945.

Q. When was he admitted there?

A. March 9, 1945.

Q. What was his condition when you first saw him?

A. Mr. Parke was suffering from a fracture of the right femur and the right wrist.

Q. What did you do for him at that time?

A. Mr. Parke was taken to the operating room

(Deposition of Francis J. Dwyer.)

and a closed reduction of the femur with pinning and external rod fixation and cast was performed. Closed reduction and cast to the right wrist was also performed.

Q. How long was Mr. Parke under your care at the hospital?

A. Until he was discharged 9-24-45.

Q. Was surgery performed by you?

A. Yes.

Q. What was his condition when the surgery was performed? [77]

A. Mr. Parke was suffering from the above-mentioned fracture of the femur and wrist.

Q. How long was he in the hospital, Doctor?

A. Mr. Parke was first discharged 4-5-45; was readmitted 4-24-45; redischarged 7-5-45; readmitted 7-29-45 and received final discharge 9-24-45.

Q. Was he under your care all this time?

A. Yes.

Q. When was he discharged? A. 9-24-45.

Q. Will you kindly state his condition when you last saw him?

A. Mr. Parke had a delayed union of the fractured femur with considerable limitation of motion of the right knee joint.

Q. How long did you treat him for the condition that you found him in?

A. From the date of admittance, 3-9-45 to date of discharge 9-24-45.

Q. Was any other Doctor called in to assist in any manner or way in the treatment of Mr. Parke?

(Deposition of Francis J. Dwyer.)

A. Yes.

Q. Please state the name or names of the Doctor or Doctors?

A. He was seen by Dr. Leo Lucas in consultation August 27, 1945. [78]

Q. How much were you paid for the services you performed for Mr. Parke?

A. I was on a fixed salary.

Mr. Dovell: No further answer to that?

Mr. Parr: No, no further answer.

Q. Who paid for the services that you performed for Mr. Eldon Parke?

A. Northern Permanente Foundation Company paid me.

Q. Who took over, if you know, Doctor, after you left the hospital?

A. Dr. J. C. Woodward, Jr.

Mr. Dovell: And no cross-interrogatories.

Mr. Parr: These are the interrogatories now propounded to Dr. Leo S. Lucas. [79]

LEO S. LUCAS

having been called to appear before Ray D. Shoemaker, a Notary Public in and for the State of Oregon, residing at Portland, Oregon, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Please state your name?

A. Leo S. Lucas.

Q. Where do you reside?

(Deposition of Leo S. Lucas.)

A. Portland, Oregon.

Q. What is your profession?

A. Orthopedic surgeon.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Washington?

A. No, I am in the State of Oregon.

Q. What is your specialty?

A. Orthopedic surgery.

Q. Are you acquainted with Eldon Parke?

A. I am, as a patient under my treatment.

Q. Were you called the year 1945 to treat Mr. Parke? A. Yes.

Q. Where did you treat him?

A. I first saw this patient in the Permanente Hospital, Vancouver, Washington, in consultation with Dr. Dwyer, about August, [80] 1945. He later came under my observation and I saw him in my office on December 11, 1945, and on nine other occasions in our physiotherapy department.

Q. What was his condition at that time?

A. His condition when I last saw him was improving. It was possible for him to extend his knee 180 degrees, which was straight, and to stretch his knees to 90 degrees, which is a right-angle. His strength was improving, he had no limp, and he was able to work.

Q. What services did you perform for him?

A. I saw him in consultation with Dr. Dwyer and then later saw him in my office, at which time I instructed him in how to improve the strength of

(Deposition of Leo S. Lucas.)

his muscles and how to obtain more movement in his knee joint.

Q. What hospital was he in at that time?

A. When first seen he was in the Permanente Hospital, Vancouver, Washington.

Q. Did you make more than one visit to him, Doctor?

A. Yes; in the hospital and in my office.

Q. What surgery, if any, did you perform?

A. I did not operate upon him.

Q. Were you paid for your services?

A. Yes.

Q. Who was it that paid the bill?

A. The Department of Labor and Industry, of the State of Washington, paid the bill. [81]

Q. What was the total amount for your services?

A. We were paid \$159.75.

Q. Will you state, Doctor, whether or not that was a reasonable sum for the services performed?

A. Yes.

Mr. Dovell: And there were no cross-interrogatories.

The Court: Is that the Plaintiffs' case now?

Mr. Parr: If the Court please, coupled with, as I understood, the stipulation. There were other things, if the Court please, that were paid—time lost and regular P.P.D. That is the regular payment that the Department of Labor and Industries makes. Does our stipulation go into that?

Mr. Dovell: I think our stipulations covered the amounts of damages on both sides.

The Court: Do you have anything further in your case for the Defendant, Mr. Dovell?

Mr. Dovell: Your Honor, I have the deposition of Mr. Cornell that I would like to read in evidence.

The Court: Very well.

(Whereupon the following interrogatories and answers thereto were read by Mr. Parr and Mr. Dovell, respectively.) [82]

HOBART C. CORNELL

having been called to appear before Anthony De-Angelo, a Notary Public in and for the County of Otsego, State of New York, residing at Oneonta, New York, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. State your name, residence, and your previous military service, if any.

A. Hobart C. Cornell, Hartwick, N. Y. I was in the U. S. Army Transportation Outfit at Vancouver, Detachment B. As a fireman my duties were to ride the fire truck to fires.

Q. State whether or not you were in the military service on March 9, 1945, and if so, where you were stationed, in what capacity, and what duties it included.

A. Yes, I was in the military service on March 9, 1945. I was stationed at Vancouver as Private First Class and was attached to the Transportation Unit as stated in A. 1.

Q. State whether or not you were in any way in-

(Deposition of Hobart C. Cornell.)

volved in an accident on March 9, 1945, between a Government fire truck and a State Patrol car which occurred at the intersection of Tenth and Washington Streets in Vancouver, Washington.

A. Yes.

Q. If your answer to question three is in the affirmative, then please state where you were and with whom, if anyone. [83]

A. I was the only man on the back end of the fire truck. The others on the truck with me were the driver, Corporal Nelson, and Private Valdez, who was riding in the front seat with the driver.

Q. If your answer to question four is that you were riding on the Government fire truck, then please state where on the truck you were riding, at which place you got on the truck, and the approximate distance it had travelled prior to said accident, and the route thereof, if you recall.

Q. I was standing on the rear platform of the truck and hanging on to the end of the truck. I boarded the truck at the Fire Station at Vancouver Barracks. I would estimate the distance from the Post Fire Station to the place of the accident at approximately one-quarter of a mile. The truck left the Post Fire Station by way of Tenth Street gate and proceeded west along Tenth Street until the truck reached the intersection of Washington Street where the accident occurred.

Q. State whether or not the siren on the Government fire truck was sounded while en route preceding said accident.

A. It was.

(Deposition of Hobart C. Cornell.)

Q. If your answer to question six is in the affirmative, then please state to what extent in time said siren was sounded while the said fire truck was en route preceding said accident.

A. It was blowing steady from the time we left the Station.

Q. Did you see the collision? [84] A. No.

Q. State whether or not you felt the impact of the truck and patrol car, and if so, at what point in the intersection.

A. Yes. When the front end of the fire truck was near the center line of the intersection I felt the impact of the collision.

Q. Do you recall the condition of the weather on the day of the accident, and, if so, please state.

A. I have no recollection of the weather at that time.

Mr. Dovell: And no cross-interrogatories. That is the Defendant's case, your Honor.

The Court: I assume you have no rebuttal?

Mr. Nelson: No, your Honor.

The Court: Do you desire to argue this matter?

Mr. Nelson: Your Honor, our argument is contained in our brief. If the Court please——

The Court: The brief has just come to me. I have checked it through as quickly as I could here. I notice you rely on California cases.

(Whereupon argument was made by Mr. Nelson on behalf of Plaintiffs, and the following proceedings then had.) [85]

The Court: I don't care particularly for you to make an argument, Mr. Dovell. Not that I mean any disrespect at all, but I am going to have to find against the Plaintiffs in this case and I will state my reasons. And I must so find even after listening to the persuasive argument of Mr. Nelson.

The facts in this case are scarcely in dispute at all.

The driver of the State Patrol car, the State Patrol officer, is of the character and type of witness that any Court enjoys having because he was candid and frank and he didn't attempt to shield himself or didn't attempt to shift responsibility. The same can be said of the driver of the Government fire truck. They were both very frank.

The witnesses who testified as to the point of collision were all people worthy of respect and I would say of high credibility, but like persons who suddenly see something, they differ as to minor details.

Now, all the witnesses, except the principles, placed these two vehicles down towards the southwest corner of that intersection. The driver of the truck—the patrol car—places himself just about across the center line of that intersection. The driver of the fire truck puts him about at the same spot, the fire truck having struck the rear of the patrol car.

Thus the Court finds that these cars came in contact at about the point in the intersection indicated by the drivers, both of whom were men that by their very nature of their occupations and [86]

work would observe more closely than the average layman would.

So that we have the point of collision fixed and the point of collision on the cars fixed.

The impact of this heavier fire truck was quite hard and it did throw the patrol car both to the west and the movement of the patrol car, moving at the speed it was, sent it considerably south.

Neither one was exceeding speed limits to any excess.

Both of them were emergency vehicles and their respective rights were equal if the activity at the moment brought them within certain immunities.

Now, that is the crux of this whole case.

I must conclude—while the evidence isn't very elaborate I think the stipulation should take us far enough so that we can conclude—that there was an understanding between the Governmental authorities of the City of Vancouver and the United States Army who had men stationed at Vancouver, each of whom maintained a fire fighting force and fire fighting equipment, that when either of them dispatched their equipment in response to a fire alarm, the other would immediately send equipment to the fire station—either at the Army or City—to stand by and take any call that might come in on another fire.

The question whether this would be an emergency to travel a distance as it was here, one-quarter of a mile, and be ready to answer a call is a question to determine here.

I think it is. I think it falls within the emer-

gency provisions and I shall briefly state why I feel that it does. [87]

The City of Vancouver, as every other municipality of that type and character, needed fire fighting equipment always standing ready and properly manned at every moment night or day. They didn't have, apparently, sufficient equipment to meet what might be their emergency needs. And, while the evidence is silent, however, I will have to assume at the moment that this run was being made from the Army fire station to the City fire station because the City equipment was out in response to a call, because the existing arrangement preceding this indicated that that was the only purpose of it.

The Army equipment was being driven by a soldier but it also carried two fire fighters who were likewise soldiers and the purpose is logical—that they were to do fire fighting if the need arose. It seems to me that this is highly important that, when it was possible that this Army fire truck reached the City fire station in the interim between the time that they were notified and it took them to go and arrive there, there might be another fire break out, and so it was important that they reach that place as quickly as possible.

The importance was recognized by the fact that the Army gave orders to its personnel in charge of this vehicle—and the personnel were required, of course, to obey these orders—that immediately upon leaving the Army station, on pulling out of the Reservation and on to Tenth Street, which was a substantial distance from the fire station—they

should commence to sound their siren and flash their red warning, and the testimony is that when one was on the other was on—that they work together in some combination. [88]

That was done.

True that Mr. Parke says he didn't hear it. There is no dispute at all from the evidence here that Army orders were being obeyed, that the siren was sounding for a distance of two or three blocks before they reached this intersection, and that the red warning lights on the vehicle indicated that it was making an emergency trip.

Neither of the vehicles, as I said, were going at any unusually high speed. They were going twenty-five (25) or thirty (30) miles an hour.

The patrol car was on an arterial and it was in the favored position with reference to traffic approaching from its left. The patrol car driver says he didn't hear and I shall find that he didn't hear, the siren and didn't see the red flashing light on the Army fire truck.

Had he looked, he probably would have seen it back a ways. The evidence is lacking entirely on whether he looked and I must assume he did not look, and I do find that the siren was being sounded at all times. That would bring this vehicle clearly within the exempt provisions of the statute.

Now these California cases: I have hastily glanced at them and they are generally a contest between an emergency vehicle and a private citizen, but not in all instances. So, to that extent, they would not be applicable. However, there is a case, just called to

my attention by my law clerk this morning, that is almost decisive of this situation. It is a case from the Ninth Circuit, and it was decided [89] probably twenty or thirty years ago. I haven't the date of it here. It involves an ordinance of the City of Seattle and the ordinance at that time had this provision:

"The following vehicles in the order named shall have the right of way in the use of all streets and public places as follows:

Apparatus of the fire department,

Police patrol wagons,

Ambulances responding to emergency calls,

Emergency repair wagons of the street railway companies . . ."

Here we had a fire truck answering a call. I can't remember the details of the case, but, at any rate, it was an action that was brought against the Puget Sound Electric Railway because they were a party to the collision. The Puget Sound Electric Railway was a foreign corporation. That is what gave the Federal Court jurisdiction. The case was tried before Judge Cushman, sitting in this Court, and it is reported in 253 Federal, page 710. Now, it was there held that the fire truck was immune and no liability. That decision was appealed. I have forgotten the name of the justice who wrote the decision, but this is a quotation from that decision:

"The question involved is one of construction. It is insisted that the [90] words 'responding to emergency calls' qualify the phrase 'apparatus of the fire department,' as well as

‘ambulances,’ and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.”

And, as I recall the facts in this case, this was fire apparatus returning from a call.

“On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance.”

That language could be easily paraphrased and set directly into our situation here.

This Army fire apparatus presents even a stronger case than city fire apparatus returning to a station where they know [91] there is more equipment, because this run was being made with knowledge of the fact that there was no other fire fighting equipment at this station to answer emergency calls. They went to the City fire station just as the City equipment would if there were a fire on the Army post and the Army equipment was out. The City was obligated to dispatch equipment and an emergency could readily arise in the interim between the leaving of one station and arriving at the other.

So that, if we look for authority, I think this case

so squarely fits the situation here that it compels me to deny the relief sought, and likewise recovery of sixty dollars on Defendant's cross-complaint against the State will be denied because it is clear that there was that degree of negligence on the part of the Defendant that would bar any recovery. The failure to yield the right of way by the State Highway Patrol, under the circumstances, was the primary cause of this collision, and I shall have to so find.

This case has been a pleasant one to try since there has been no very sharp conflict in the testimony and I reiterate that the people who could be most depended where they were not inclined to be prejudiced, were the two drivers of the two emergency vehicles, and they both impressed the Court as being very high class persons.

Sometimes we are inclined to draw the impression that there is carelessness on the part of young men in the military service in the operation of vehicles, but in this case the Court had the privilege of seeing the young man, who at the time was in the military service and given the responsibility of operating that emergency vehicle, and [92] he gave every indication of being a highly dependable individual.

There is this thing about this case: It is largely marked by the "Nelson" feature. Counsel for the State, one of them, is a Mr. Nelson, and one of the State's witnesses was a man named Elmer Nelson, and the driver of the military vehicle is Clarence Nelson. That is just a comment in passing because it seems so unusual to the Court that out of seven

or eight people we should have so many with the same name. It is a highly honorable name.

On the facts I shall have to determine as I have indicated, and state to Counsel for the State that you will doubtless now examine this Federal case from this Court of Appeals. That does, in my judgment, cover this issue here and is decisive.

I do, as a matter of construction, find that under the facts as they existed here, and it was so recognized by the City of Vancouver and by the Army officials, that this trip from one station to another upon a call from either of them was an emergency. That being so, then this immunity attaches to the Army fire truck.

You may prepare findings and conclusions and submit them and I will allow exceptions to the State and to the Government.

You may want to take this case to the Circuit Court on the facts because we ruled adversely on the questions first raised and the Government, having a ruling against them, will have exceptions allowed, and I think your findings and judgment should recite that. That is on the statute of limitations and the issue of the right of subrogation. [93]

Mr. Dovell: And res adjudicata.

The Court: And res adjudicata. But the Court held against the Defendant on both of those—on all three of those—raised.

Do you intend to resist right of subrogation on the part of the State?

Mr. Dovell: I think, your Honor, that that has

since been settled. I think that that is settled and in that case——

The Court: It has never been settled as to a sovereign state, but it has been settled as to an insurance company, and, of course, every reason that could be advanced as to an insurance company would apply to the state.

Mr. Dovell: It looked to me like the State went into the insurance business in this instance.

The Court: Well, at any rate, each side will have exceptions to adverse rulings and you may prepare findings and judgment and decree.

Mr. Nelson: Thank you, your Honor.

The Court: Court will stand adjourned until two o'clock tomorrow afternoon.

(Whereupon, at 11:10 a.m., December 19, 1950, hearing in the within-entitled and numbered cause, was adjourned.) [94]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a full and complete, true and correct, transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed March 10, 1951.

In the United States District Court, Western
District of Washington, Southern Division

No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers and pleadings in the above-entitled cause as are designated by the written Stipulation of the parties hereto, and the said papers and pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled cause filed and entered on January 9, 1951, to the United States Court of Appeals for the Ninth Circuit at

San Francisco, California, and are identified as follows:

1. Order Granting Leave to File Second Amended Complaint (filed Dec. 11, 1950) (19)
2. Second Amended Complaint (filed Dec. 11, 1950) (20)
3. Amended Answer and Cross-Complaint (filed Dec. 15, 1950)..... (22)
4. Reply to Amended Answer and Cross-Complaint (filed Dec. 18, 1950)..... (24)
5. Findings of Fact and Conclusions of Law (filed Jan. 4, 1951)..... (30)
6. Judgment (filed and entered Jan. 9, 1951) (28)
7. Memorandum of Costs and Disbursements (filed Jan. 9, 1951)..... (32)
8. Notice (Plaintiffs') of Appeal (filed Mar. 8, 1951)..... (34)
9. Cost Bond (of Plaintiffs') on Appeal (filed Mar. 8, 1951)..... (35)
10. Notice (Defendant) of Appeal (filed Mar. 8, 1951)..... (36)
11. Reporter's Transcript of Record (filed Mar. 10, 1951)..... (37)
12. Stipulation of Parties, with Approval of Court re filing of Defendant's Exhibit A-1 (filed Mar. 15, 1951)..... (38)
13. Stipulation Designating Parts of Record on Appeal (filed Mar. 22, 1951).... (41)
14. Statement (Plaintiffs') of Points (filed Mar. 22, 1951)..... (40)

15. Statement (Defendant) of Points (filed
Mar. 22, 1951)..... (39)

I do further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits admitted in evidence in the trial of the above-entitled cause, to wit:

Plaintiffs' Exhibits Nos. 1, 2 and 3, and

Defendant's Exhibit No. A-1 (attached to Stipulation above referred to and filed Mar. 15, 1951).

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal (Plaintiffs)..... \$5.00

Notice of Appeal (Defendant)..... \$5.00

and that said fee of \$5.00 due the Clerk by Plaintiffs is being paid by State of Washington warrant and the fee of \$5.00 of Defendant has not been paid for the reason that the appeal of Defendant is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 7th day of April, 1951.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12895. United States Court of Appeals for the Ninth Circuit. State of Washington, a Sovereign State, and Smith Troy, Attorney General of the State of Washington, Appellants, vs. United States of America, Appellee. United States of America, Appellant, vs. State of Washington, a Sovereign State, and Smith Troy, Attorney General of the State of Washington, Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filed April 9, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12895

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellants.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD FOR
PRINTING

Come now appellants and pursuant to subdivision 6, rule 19 of the rules of the United States Court of Appeals for the Ninth Circuit, herewith adopt the statement of points filed by them in the district court upon which appellants intend to rely on appeal, and herewith designate the entire transcript of record as prepared and certified by the clerk of the district court, to be printed for purposes of this appeal.

Dated this 23rd day of April, 1951.

SMITH TROY,
Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT ON CROSS-
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING

Comes now United States of America, appellee on the appeal of the State of Washington, and of Smith Troy, Attorney General thereof, and appellant on its own Cross-Appeal, and pursuant to subdivision 6, Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit, herewith adopts the statement of points filed by it in the District Court upon which this appellant intends to rely in this court and cause; and with the foregoing statement, the said appellant designates as necessary for the consideration of said appeal and cross-appeal all that portion of the original papers of

record in this cause, and exhibits therewith certified and transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit in this cause, pursuant to stipulation of parties covering omissions from record on appeal, with exception of documents therein named.

Dated this 24th day of April, 1951.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ GUY A. B. DOVELL,
Asst. U. S. Attorney.

Attorneys for Appellee and Cross-Appellant, United
States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 28, 1951.

In the
United States
Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
Washington, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

v.

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
Washington, *Appellees.*

No. 12895

UPON APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

**BRIEF OF APPELLANTS
AND CROSS-APPELLEES**

SMITH TROY,

Attorney General of the State of Washington,

HARRY L. PARR and C. R. NELSON,

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Attorneys for Appellants and Cross-Appellees,

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United States Attorney,

GUY A. B. DOVELL,

Assistant United States Attorney,

Attorneys for Appellee and Cross-Appellant.

In the
United States
Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
Washington, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

v.

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
Washington, *Appellees.*

No. 12895

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS
AND CROSS-APPELLEES

SMITH TROY,

Attorney General of the State of Washington,

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Attorneys for Appellants and Cross-Appellees,

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United States Attorney,

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Assistant United States Attorney,

Attorneys for Appellee and Cross-Appellant.

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In the
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Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
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v.

UNITED STATES OF AMERICA, *Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

v.

STATE OF WASHINGTON, a Sovereign State, and
SMITH TROY, Attorney General of the State of
Washington, *Appellees.*

No. 12895

UPON APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

**BRIEF OF APPELLANTS
AND CROSS-APPELLEES**

JURISDICTION

This is a civil action by the State of Washington, pursuant to the Federal Tort Claims Act of 1946 as amended in 1949, 28 U.S.C., §§ 1346(b), and 2671, to recover money the state was required to expend as a result of the negligence of an agent of the United States of America, while acting within the scope of his authority, all as

alleged by the second amended complaint herein. (Tr. 4.)

The district court had jurisdiction by virtue of 28 U.S.C., § 1346(b).

This appeal is pursuant to Title 28 U.S.C., § 1291 from the final judgment entered by the district court on the 9th day of January, 1951. (Tr. 27.)

STATEMENT OF THE CASE

This action is based upon the Federal Tort Claims Act to recover money which the State of Washington was required to expend as a result of the negligence of an agent of the Federal government. The original complaint on this cause of action was filed on June 4, 1948. (Tr. 38.) The complaint was dismissed on January 17, 1949, pursuant to stipulation of counsel for the respective parties for the reason that the cause of action was barred by the Statute of Limitations. (Tr. 45.) On March 1, 1950, subsequent to the enactment of 63 Stat. 62, 28 U.S.C., § 2401(b), the complaint was filed upon which this action is based. (Tr. 60.) This cause was tried on the second amended complaint (Tr. 4), which alleged that an employee covered by the Workmen's Compensation Act of the State of Washington was injured when an Army fire truck, driven by a duly authorized agent of the U. S. Army in the course of his employment, negligently entered an arterial highway at 25 miles per hour and struck the car being driven by the employee; that the employee, pursuant to Washington statute, elected to take the benefits of the Workmen's Compensation Act and assigned to the State of Washington his cause of action against the United States of America; and that the State of Washing-

ton, Department of Labor and Industries was required to expend \$3,671.56 as a result of the injuries received by the employee, and prayed for judgment against the defendant in that amount.

The answer and cross-complaint of defendant, United States of America, filed December 15, 1950, set up defenses and alleges, among other things, that the proximate cause of the accident was the negligence of the state employee, and that the defendant was damaged in the amount of \$60.76 thereby. (Tr. 10.)

Plaintiffs' reply (Tr. 18) denied the allegations of the answer, and the case was set down for trial on December 18, 1950. On that date the case was tried before the court, sitting without a jury. (Tr. 49.)

At the opening of the trial the court first considered the defenses that the complaint was not timely filed; that a complaint setting out the same cause of action had been dismissed on January 17, 1949, and that pursuant to Rule 41(b) of Federal Rules of Civil Procedure such dismissal operated as an adjudication upon the merits and the matters alleged in the complaint had become *res adjudicata*. (Tr. 49.)

The court ruled against the defendant on these defenses (Tr. 59, 60) and evidence was received and testimony taken. The evidence and testimony showed that on March 9, 1945, the date of the accident here involved, there was some sort of an agreement between the fire department of the city of Vancouver, Washington, and the Army authorities at Vancouver Barracks whereby, when the fire-fighting equipment of the one was called out in answer to a fire alarm the other would send a fire truck to the fire station of the first to stand by in case of

a second fire alarm; that upon that date, at approximately 4:00 o'clock p. m., the city fire department requested a standby fire truck from the Army authorities, and in response to this request an Army fire truck was dispatched to the Vancouver city fire station. This fire truck, with its siren sounding and red light flashing proceeded at 30 miles per hour along the usual route to the city fire station. The usual route was westward along 10th Street which crossed Washington Street, an arterial. The fire truck did not stop before entering the arterial (it slowed from 30 to 25 miles per hour), but entered the intersection at 25 miles per hour. At approximately the center of this intersection, which is in the congested business section of the city, the fire truck struck a Washington highway patrol vehicle on the left rear side, knocking the patrol car 20 feet and throwing the driver out and seriously injuring him. The jolt of the impact stopped the fire truck but it immediately set off on its journey without even stopping to render aid as required by state law. (Rem. Rev. Stat., § 6360-134.) It proceeded two and one-half blocks further to the city fire station, where it was parked. The highway patrol car was being driven by Eldon Parke, a state patrolman acting in the course of his employment. He was driving in a southerly direction on Washington Street at 20 miles per hour on his way to the patrol headquarters at the time of the accident. He was covered by the provisions of the Workmen's Compensation Act of the State of Washington and elected to take the benefits of the Act. The Department of Labor and Industries of the State of Washington was required to expend \$3,671.56 as a result of this injury to its employee who assigned his cause of

action against the United States of America to the State of Washington.

At the conclusion of the testimony and argument of plaintiffs' counsel the court made its oral decision, finding against the plaintiffs, based upon *Puget Sound Electric Ry., et al., v. Benson*, 253 Fed. 710 (1918). (Tr. 123.) On January 4, 1951, the findings of fact and conclusions of law were filed (Tr. 21), and pursuant thereto judgment was entered January 9, 1951, denying the plaintiffs the relief prayed for in their complaint and dismissing their action, and also denying the defendant the relief prayed for in its cross-complaint and dismissing its cross-complaint and taxing costs against the plaintiff. (Tr. 27.)

Thereafter, plaintiffs duly perfected their appeal from this judgment (Tr. 30, 31), which presents to this court the question whether the Army fire truck was, at the time of the accident here involved, answering an emergency call within the purview of Washington law, and if so, was it operated with due regard for the safety of all persons using the public highway.

SPECIFICATION OF ERRORS

1. The court erred in making the following finding of fact:

“ * * * Under the facts as they existed and were so recognized by the Army and the City of Vancouver, it is clear that this trip was in fact an emergency trip, and that the government fire truck had the right of way enroute to the city fire station. * * * ” (Tr. 25.)

Said finding was in error for the following reasons:

A. The transcript does not contain so much as one word of evidence tending to show that the City of Vancouver recognized the fact that the trip of the Army fire truck to the city fire station to act as a standby vehicle was an emergency trip.

B. The applicable Washington statute (Rem. Rev. Stat., § 6360-5) extends immunity from the rules of the road to a fire truck, only when said fire truck is “actually responding to an emergency call * * * within the purpose for which such emergency vehicle has been authorized * * * ,” and this fire truck was not privileged to run through an arterial stop (Tr. 103) for it was proceeding, not in response to a fire alarm, but to the Vancouver city fire station to act as a standby vehicle. (Tr. 107.)

2. The court erred in making the following finding of fact:

“ * * * the proximate cause of the accident was the failure of the driver of the state patrol car to yield the right of way to the defendant’s fire truck, * * * .” (Tr. 25.)

Said finding was in error for the reason that the state patrol car was traveling on an arterial street (Tr. 73) and was entitled to the right of way over the defendant’s

fire truck for the same reasons as stated in "B" above with respect to the finding of fact quoted in Specification No. 1.

3. The court erred in making the following conclusion of law:

"That the plaintiffs are not entitled to recover judgment on their action, * * * and the plaintiffs' action, * * * should therefore * * * be denied and dismissed, and that the defendant is entitled to judgment for costs * * * ." (Tr. 26.)

The foregoing conclusion of law is in error for the following reasons:

A. The proximate cause of the accident was the failure of the Army fire truck to yield the right of way to the patrol vehicle, for the fire truck was not privileged to disregard the rules of the road for the same reasons as stated above in "1B" with respect to the finding of fact quoted in Specification No. 1.

B. If the Army fire truck was responding to an emergency call within the purview of the Washington statute (Rem. Rev. Stat., § 6360-5) it was not operated "with due regard for the safety of all persons using the public highway," and was driven in complete disregard of the rights of the patrol vehicle.

C. The defendant was not entitled to judgment for costs for the reasons stated in the two preceding paragraphs.

4. The court erred in entering judgment denying plaintiffs the relief prayed for and dismissing said action, and in awarding costs to defendant. (Tr. 27, 28, 29.)

The entry of said judgment was in error for the same reasons as stated above with respect to the conclusion of law quoted in Specification No. 3.

SUMMARY OF ARGUMENT

I. The Fire Truck Was Not Actually Responding to an Emergency Call Within the Purview of the Washington Statute, and It was Not Entitled to Immunity from the Rules of the Road Afforded By the Statute.

A. The liability of the defendant is to be determined by the law of the State of Washington.

B. The State of Washington is entitled to maintain this suit.

C. Emergency vehicles are immune from the rules of the road by Washington Statute (Rem. Rev. Stat., § 6360-5) *only* while actually responding to an emergency call. This fire truck was not responding to an emergency call, and its violation of the rules of the road was the proximate cause of the accident, making the defendant liable for the damages resulting from the collision.

II. If This Fire Truck Was, at the Time of This Accident, Actually Responding to an Emergency Call, Then It Was Not Operated With Due Regard for the Safety of the Highway Patrolman as Required by Statute.

A. The highway patrolman was not afforded a reasonable opportunity to stop or otherwise yield the right of way to the fire truck, and the defendant is liable for the damages resulting from the collision.

ARGUMENT

I. The Fire Truck Was Not Actually Responding to an Emergency Call Within the Purview of the Washington Statute, and It Was Not Entitled to Immunity From the Rules of the Road Afforded by the Statute.

A. The accident from which this litigation arises occurred in Vancouver, Clark County, Washington (Tr. 74) and the question of liability of the defendant, United States of America, must be determined by the laws of the State of Washington. (28 U.S.C. § 1346(b)).

B. The State of Washington is entitled to maintain this action as assignee of Eldon Parke of his cause of action against the United States of America as provided by Rem. Rev. Stat., § 7675:

“ * * * if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; * * *. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion.
* * * ”

C. The questions presented to the court by this appeal are questions of construction of Rem. Rev. Stat., § 6360-5, which provides:

“The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:

“(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate

pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: *Provided*, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: *Provided, further*, The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized;

“(b) To any persons, teams, vehicle or other equipment while actually engaged in authorized work upon the surface of a public highway in so far as suspension of the provisions of this act are reasonably necessary for the carrying on of such work: *And providing*, Reasonable precautions are taken to apprise and protect the users of such public highway, but such provisions shall apply to such persons, teams, vehicles and other equipment when traveling to and from such work;

“(c) To any persons, vehicles or otherwise, in so far as the same may be specifically exempted from any provision or provisions of this act.”

Under the common law any municipal corporation which owns and operates a fire truck is not liable for damage negligently inflicted by such fire truck, for the operation of a fire truck is held to be a governmental function, and municipal corporations enjoy the immunity of the sovereign. 60 C.J.S. Motor Vehicles, § 372; *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791; *Bradley v. City of Oskaloosa*, 193 Iowa 1072, 188 N. W. 896; *Gillespie v. City of Lincoln*, 35 Neb. 34, 52 N. W. 811.

As early as 1913 the legislature of the State of Nebraska modified this common law rule applicable to the operation of fire fighting equipment. The reason for this

modification is well stated in *Opocensky v. City of South Omaha*, 101 Neb. 336, 163 N. W. 325 at page 327:

“Conditions have greatly changed in the use of the streets of cities in Nebraska since the decision of *Gillespie v. City of Lincoln*, supra, in 1892, particularly in the use of automobiles and other dangerous motor vehicles, and the Legislature has modified the law announced in that case as found in section 3049, Rev. St. 1913:

“ * * * Provided, the speed limits in this section shall not apply to physicians, or surgeons, or police, or fire vehicles, or ambulances when answering emergency calls demanding excessive speed.’

“The driver of this automobile was not ‘answering calls demanding excessive speed.’ He was therefore violating the law. He was not performing any service enjoined upon him by the state, but was acting under the authority of the city testing an article of the city property. Under modern conditions, such conduct is dangerous and, as it is wholly unnecessary, is forbidden by express statute.”

In deciding this cause the lower court felt bound by the case of *Puget Sound Electric Ry. et al. v. Benson*, supra, which was decided by the U. S. Circuit Court of Appeals, Ninth Circuit, on October 28, 1918. (Tr. 127, 128, 129, 130.) In that case the plaintiff was injured in a collision with defendant’s electric street car at a street intersection. He was at the time driving fire fighting apparatus belonging to the City of Seattle, and was returning from, and not going to, a fire. The case involved the construction of an ordinance of the City of Seattle which provided:

“The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. mail wagons.’ ”

In the course of the opinion, it was there said:

"The question involved is one of construction. It is insisted that the words 'responding to emergency calls' qualify the phrase 'apparatus of the fire department,' as well as 'ambulances,' and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.

"The application of one of the simplest canons of statutory construction, namely, that 'a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction' * * *, would seem to be decisive of the question. The last antecedent is 'ambulances,' and under this rule the qualifying clause refers thereto, and not to the antecedents preceding that * * *."

It will be noted that, under that ordinance, fire trucks were given *carte blanche* right of way over all other users of the highway and it is submitted that this case is not in point as the questions here involved are of the construction of Rem. Rev. Stat., § 6360-5.

The Army fire truck, at the time of the accident here involved, was proceeding from the Army barracks to the Vancouver city fire station in order that it would be present, and could answer a fire alarm were one to be reported at the city fire station. (Tr. 107.) Its trip for this purpose puts it in the same category as though it were returning to the fire station after having answered a fire alarm.

A search fails to reveal any Washington cases interpreting Rem. Rev. Stat., § 6360-5, the pertinent statute here involved, and it therefore becomes necessary to resort to cases from other jurisdictions which interpret like or similar statutes.

In *Audette v. New England Transp. Co.*, 71 R. I. 420, 46 A. (2d) 570, the plaintiff was the driver of a fire truck

of the city of Pawtucket, and while returning to the fire station after answering a fire alarm, he was injured when the fire truck was in collision with defendant's bus at a street intersection. In the course of the opinion it was there said:

"The second above-mentioned matter, which was injected into this case as a result of defendant's strong reliance on plaintiff's failure to heed the stop sign, is plaintiff's contention that under G. L. 1938, chap. 88, § 10, the bus was under the duty to stop 'upon the approach of any fire apparatus which is *going* to a fire or responding to an alarm.' (Italics ours.) Plaintiff argues that a truck which is *returning* from a fire or from responding to an alarm is entitled to the benefit of this statute. This contention is without merit. The obvious answer thereto is that if such was the intent and purpose of the statute it would have been easy for the legislature to have so indicated in plain and clear language."

In *Schumacher v. City of Milwaukee*, 209 Wis. 43, 243 N. W. 756, the plaintiff was injured when the car in which he was a passenger, was struck at a street intersection by a fire truck of the defendant city. At the time of the accident the fire truck was returning to the fire station after answering an alarm, and it passed through a red light at the intersection. In the course of the opinion in that case it was said:

"It is next urged that the court erred in excluding evidence which was offered to show the meaning of the term 'answering a fire alarm' as that term is used in section 85.16(3), 1927 stats., which exempts police officers and others from speed limitations and highway traffic regulations in certain cases. Among other things, it is provided that 'all members of fire departments shall likewise be exempt while going to a fire or answering a fire alarm.' In this case the truck had been driven to the point indicated by the alarm; the fire was of no consequence. The defendant sought to show that, according to the regula-

tions of the fire department, answering a fire alarm included taking the equipment out and all things done in response to the alarm until the equipment was returned to its place. If such a regulation exists in the Milwaukee fire department, it would hardly control courts in the determination of the legislative purpose in the enactment of the section referred to. If the intent and purpose of the Legislature was to provide that all members of fire departments were exempt while upon the public streets in the operation of fire equipment, it would have been very easy for the Legislature to have so indicated. They said they should be exempt while going to a fire and so as to complete the exemption in cases where the alarm was turned in when there was no fire, when answering a fire alarm was included, putting the two things upon an equal footing. We can discover no legislative purpose to exempt members of fire departments from the operation of the statute except when they are going to a fire or going to a place in response to a fire alarm."

In *Lucas v. City of Los Angeles*, 10 Cal. 2d 476, 75 P. (2d) 599, the plaintiff was a passenger in an automobile which entered an intersection in response to a mechanical "Go" sign. In the middle of the intersection a police automobile of defendant municipal corporation, operated upon authorized emergency business, traveling at a high rate of speed and disregarding the traffic "Stop" signal, crashed into it, and plaintiff was injured. The plaintiff conceded that the defendant's automobile was responding to an emergency call, and that it was privileged to disregard the rules of the road, but contended that the defendant was guilty of an "arbitrary exercise of the privileges" in violation of statute. The court, in discussing this phase of the case in 75 P. (2d) 599, said at page 603:

"The expression 'arbitrary exercise of the privileges' has also caused some confusion. Since the

vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. These are among the 'privileges' which are granted by the statutes. An arbitrary exercise of them may rest upon the question whether an emergency in fact existed. The statute has determined this question in part by the limitation in section 120 to cases where the emergency vehicle is engaged in the chase of violators of the law or in response to a fire alarm. Members of the fire and police departments are relieved from civil liability when 'responding to an alarm of fire or an emergency police call.' Thus, if such a vehicle is being operated in response to a fire alarm, excessive speed alone is not an arbitrary exercise of these privileges. If these privileges were exercised in returning from a fire, or for some private purpose of the operator, it might be a case of an arbitrary exercise of them. Such is the effect of the rulings in *Hopping v. Redwood City*, 14 Cal. App. 2d 360, 58 P. 2d 379, and *Von Arx v. Burlingame*, 16 Cal. App. 2d 29, 60 P. 2d 305, where the facts disclosed that the public vehicles were not being operated in response to emergency calls at the time the injuries were inflicted. In David's 'Municipal Liability for Tortious Acts and Omissions,' page 141, the author advances the view that 'the practical purpose of this phrase was to cover the cases in which the authorized emergency vehicle is not enroute to the bedside of the sick man, the scene of the crime or the location of the fire; but where the drivers, by virtue of the character of the vehicle and by use of its siren, maintain non-necessary speeds and drive with abandon of the usual rules of the road, when there is no need. This is the case where the fire engine is returning from the fire, in the absence of any new call or emergency; where the engine of the motor vehicle is being warmed up or tested; when the policeman is making routine runs with no criminal in sight or immediate contemplation.'

* * * "

The Washington statute requires that authorized emergency vehicles, to be entitled to immunity from the

rules of the road, must be "*actually* responding to an emergency call within the purpose for which such emergency vehicle has been authorized." (Italics supplied.) The "purpose" for which fire trucks are authorized is the preservation of life and property, and when answering emergency calls within this "purpose" public policy dictates that fire trucks should reach the scene of the emergency with all reasonable haste. But to permit a fire truck, with its extreme weight, and terrific capacity to cause harm, to speed through the busy streets of a modern city with their attendant congestion of automobiles and pedestrians, in complete disregard of the rules of the road, when such action is not necessary for the preservation of life or property, is repugnant to public policy and the laws of our modern civilization. This is the type of action the Washington Legislature, in enacting Rem. Rev. Stat., § 6360-5, sought to prevent.

This fire truck was not actually responding to an emergency call within the purpose for which it was designated and it was subject to the same laws as any other vehicle upon the highway. A vehicle approaching an intersection is required to give the right of way to vehicles on their right as provided in Rem. Rev. Stat., § 6360-88:

"It shall be the duty of every operator of any vehicle on approaching public highway intersections to look out for and give right of way to vehicles on their right, simultaneously approaching a given point within the intersection, and whether such vehicle first enter and reach the intersection or not: *Provided*, This section shall not apply to operators on arterial public highways."

Rem. Rev. Stat., § 6360-90 provides:

"The operator of any vehicle shall stop as required by law at the entrance to any intersection

with any arterial public highway, and having stopped shall look out for and give right of way to any vehicles upon such arterial highway simultaneously approaching a given point within the intersection, whether or not such vehicle first reach and enter the intersection."

These laws are applicable within incorporated municipalities as well as without municipalities as provided by Rem. Rev. Stat., § 6360-2:

"The provisions of this act relating to vehicles shall be applicable and uniform throughout this state and in all incorporated cities and towns and all political subdivisions therein and no local authority shall enact or enforce any law, ordinance, rule or regulation in conflict with the provisions of this act except and unless expressly authorized by law to do so and any laws, ordinances, rules or regulations in conflict with the provisions of this act are hereby declared to be invalid and of no effect. Local authorities may, however, adopt additional vehicle and traffic regulations which are not in conflict with the provisions of this act."

All vehicles are required to stop before entering an arterial highway as provided by Rem. Rev. Stat., § 6360-105:

"All primary state highways are hereby declared to be arterial highways as respects all other public highways or private ways. Those city streets designated by the director of highways as forming a part of the routes of primary state highways through incorporated cities and towns are hereby declared to be arterial highways as respects all other city streets or private ways. The operator of any vehicle entering upon any arterial highway from any other public highway or private way shall come to a complete stop before entering such arterial highway when stop signs are erected as provided by law."

All vehicles involved in an accident in which any person is injured, are required to stop and render aid as

required by Rem. Rev. Stat., § 6360-134, which provides, in part:

“(a) An operator of any vehicle involved in an accident resulting in the injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident * * *.”

Washington Street, in the City of Vancouver, Washington, was, at the time of this accident, designated by the Director of Highways as a primary state highway and an arterial highway (plaintiff's exhibit 2), pursuant to Rem. Rev. Stat., § 6450-61 (1943 Supp.), as follows:

“The Director of Highways shall determine what city streets, if any, in any such incorporated cities and towns shall form a part of the route of any primary or secondary state highway through such incorporated cities and towns, and, between the first and fifteenth days of April of each year, shall certify by brief description, in duplicate, one copy to the State Auditor and one copy to the clerk of each incorporated city and town, which streets, if any, in such city or town are designated as forming a part of the route of a primary or secondary state highway through such city or town.”

II. If This Fire Truck Was, at the Time of This Accident, Actually Responding to an Emergency Call, Then It Was Not Operated With Due Regard for the Safety of the Highway Patrolman.

If the court finds that this fire truck was, at the time of this accident, actually responding to an emergency call, and the appellants earnestly contend that it was not, then this fire truck was not operated with due regard for the safety of Eldon Parke, the state highway patrolman.

Rem. Rev. Stat., § 6360-5 provides in part that:

“* * * the provisions of this section shall not relieve the operator of an authorized emergency

vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: * * *

The reported cases make a broad distinction between the acts which will be held to violate the "duty to operate with due regard for the safety of all persons using the public highway" and those acts which will be held to be "a reckless disregard for the safety of others." The case of *Raynor v. City of Arcata*, Cal. Sup., 77 P. (2d) 1054 at page 1057 sets out this distinction very clearly. It is said:

"The provisions in sections 120 and 132, supra, to the effect that the exemptions there given shall not relieve the driver of an emergency vehicle of the duty to drive with due regard to the safety of the public, means that the driver must, 'by suitable warning, give others a reasonable opportunity to yield the right of way.' *Lucas v. City of Los Angeles*, Cal. Sup., 75 P. 2d 599, 603. The sections also provide that the exemption shall not protect the driver from 'an arbitrary exercise' of the privileges there granted. But an arbitrary exercise of said privileges cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given. 'In such cases speed, right of way, and all other "rules of the road" are out of the picture.' 75 P. 2d 599, 605."

In the instant case Eldon Parke was traveling south along Washington Street, an arterial street, and there was a "Stop" sign facing traffic approaching this street from the east along 10th Street as was this fire truck. (Tr. 81.) Eldon Parke was very familiar with this intersection, and with the fact that traffic seeking to enter Washington Street from 10th Street was required by law to stop. (Tr. 73.) Parke had entered the intersection before he heard a siren (Tr. 75) and it was a matter of only

a few seconds from the time he heard the siren until his car was struck in the left rear portion by the fire truck. (Tr. 81, 83.) The Army fire truck did not stop at the "Stop" sign, but entered the arterial street, Washington Street, at 25 miles per hour. (Tr. 108.) At the time this fire truck started on this trip the driver was not under the apprehension that he was answering an alarm of fire, but knew that he was to go to the city fire station to act as a standby vehicle. (Tr. 107.) When the fire truck reached the city fire station it was parked inside the station. (Tr. 108.)

The statutory provision requiring emergency vehicles, while answering emergency calls, to operate with "due regard to the safety of the public" was before the court in the case of *Balhasar v. Pacific Electric Ry. Co.*, 187 Cal. 302, 202 Pac. 37, and in considering this provision of the statute the court said:

"It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus. * * *"

In *Muhs v. Fire Ins. Salvage Corps of Brooklyn*, 85 N. Y. Supp. 911, the plaintiff, a pedestrian, was run over by a fire engine which was responding to a fire alarm. In upholding a verdict for the plaintiff, the court said at page 912:

"The defendant is not absolved from liability for negligence merely because, by the terms of the act incorporating it (section 2, c. 1016, p. 2064, Laws 1895), it is given 'the right of way in the streets of

Brooklyn.' Such right of way is necessarily subject to the preservation of the safety of those who may be lawfully upon the streets at the time of a fire, and, while the emergency under which the defendant's servants are called upon to act undoubtedly justifies speed in driving to the scene of disaster, such speed must be exerted with reasonable care and a due regard to the lives and limbs of those who may be met upon the way. In the eagerness to save property, the value of human life is sometimes lost sight of. * * *

In *City of Lansing v. Hathaway*, 280 Mich. 87, 273 N. W. 403, a fire truck of the plaintiff city, while answering a fire alarm, ran a red stop light at an intersection and, while crossing the intersection, was struck by defendant's automobile which entered the intersection under protection of the green light. The city brought the suit to recover the expense of repair to the truck and the cure of the injured fireman. In the course of the opinion it was there said:

"The fire truck and the automobile entered the intersection at the same time. We assume, for the purposes of decision, that, under the city ordinance, the fire truck, as an emergency vehicle responding to a fire alarm, had a right to run the red light upon giving 'audible signal' and having reasonable regard for the safety of others. Defendant had a right, under permission of the green light, to cross the intersection unless, by the reasonable exercise of the senses of sight and hearing, he should have noticed or heard warning to the contrary.

"The evidence in the case fully justified the following finding and conclusion of law by the circuit judge: 'The issue of fact is rather close but I am brought to the conclusion that it cannot be affirmatively said that the defendant was guilty of negligence in the operation of his car. Rather I think that he did what the ordinary operator of a vehicle would have done in approaching this intersection. He was making observations through his windshield. He

saw the automobiles at the intersection. He observed that the traffic light was with him, and there was no obstacle in his immediate pathway. His vision of the approaching truck as he entered the intersection was cut off by other cars. To say that he was guilty of negligence in proceeding necessarily implies that due care required him to come to a stop, an operation that might have been attended with some danger. In any event, it can scarcely be claimed that the ordinary driver of an automobile would have stopped, or have acted in any other manner than did the defendant. As I view the situation, the accident, and resultant injury to the property of the plaintiff, should be regarded as having occurred without actionable fault.' "

In *Ferraro v. Earle et al.*, 105 Vt. 243, 164 Atl. 886, the plaintiff was a passenger in an automobile which was struck at an intersection by a fire truck driven by the defendant. At the time of the accident the fire truck was responding to a fire alarm, and entered the intersection with the red light against it. In the course of the opinion it is said:

"While the fire truck was favored with the statutory right of way and the act of driving it through the intersection against a red light did not, of itself, constitute negligence as a matter of law, it does not follow that Earle was privileged to proceed in disregard of the rights of others. *Jasmin v. Parker*, 102 Vt. 405, 416, 148 A. 874, and cases cited. The right must be exercised in a reasonable manner in view of the circumstances. It remains to consider whether the evidence made the question of Earle's negligence an issue for the jury. His conduct must be judged by the situation and conditions confronting him. He was confronted with the duty of the due performance of his public service, and the apparent exigency of the occasion which called for haste to bring the services of men and equipment to the place where property or lives, or both, might be exposed to the hazards of fire; he was approaching an intersection with the right of way for him, but with a red

light against him. The red light was a warning to him that traffic on West street might be proceeding into the intersection without knowledge of the approach of the fire truck and in reliance upon the protective invitation of the green light. The mandate of the statute (subdivision 3, § 68, No. 70, Acts 1925), applicable to the operator of a vehicle of any kind, is that 'all intersecting highways shall be approached and entered slowly and with due care to avoid accident.' 'Due care' is care commensurate with the circumstances calling for its exercise. The precautions to be taken increase with the hazards. The situation confronting the defendant Earle required him to be very alert and watchful to avoid injury to others; that is, he was bound to exercise the care of a prudent person, who was driving a fire truck to a fire at the place and under the circumstances here disclosed. * * *

In the instant case Eldon Parke had a right to cross the intersection on this arterial street unless, by the reasonable exercise of his senses of sight and hearing, he should have noticed or heard warning to the contrary. The court found that he neither heard the siren nor saw the red flashing light of the fire truck. (Tr. 126.) The driver of the fire truck did not see the automobile driven by Eldon Parke, but that was only because he failed to look. (Tr. 108.) The fire truck drove through the "Stop" sign at 25 miles per hour (Tr. 108) and Eldon Parke did not have a reasonable opportunity to stop or otherwise yield the right of way. The defendant having failed to give Eldon Parke a reasonable opportunity to yield the right of way, is liable for the damage resulting from the collision.

CONCLUSION

It is conceded that no case is here cited which is exactly on all fours with the questions here involved. However, a consideration of the Washington statute, in the light of the cases cited, and the changes that have been wrought in our society during the past forty years, force one to the conclusion that the Legislature, in enacting the statute here under consideration, sought to forestall such action as the fire truck here involved was guilty of, and failing to forestall such action, it was the legislative purpose to hold the owners liable for any mischief created.

Respectfully submitted,

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IN THE
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CROSS-APPELLANT**

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HONORABLE CHARLES H. LEAVY, Judge

BRIEF OF APPELLEE AND CROSS-APPELLANT

JURISDICTIONAL STATEMENT ¹

The defendant accepts plaintiffs' jurisdictional

¹ Since consolidated cross-appeals are involved herein, the several parties are referred to in this Brief, for the purposes of convenience and avoidance of confusion, by their respective designations in the court below, that is, the State of Washington, and Smith Troy, Attorney General of the State, are referred to herein as "plaintiffs" and United States of America, defendant, and cross complainant below, is referred to herein as "defendant".

statement with the reservation that the cause of this action, as stated therein on the part of plaintiffs, to-wit, "to recover money the state was required to expend as a result of the negligence of an agent of the United States of America while acting within the scope of his authority," is plaintiffs' contentions and not a statement of fact.

STATEMENT OF PLEADINGS AND FACTS

On December 9, 1947, plaintiffs filed their original complaint on the present cause of action in the District Court as civil cause No. 1083, which, on motion of defendants therein named and after argument, was dismissed by the court on jurisdictional grounds on May 20, 1948, without prejudice and without costs. (R. 14).

On June 4, 1948, plaintiffs filed their second complaint on the present cause of action with the District Court as civil cause No. 1137, to which defendant on July 21, 1948, interposed its motion to dismiss on the principal ground that the suit was barred by the statute of limitations, pursuant to and in agreement with said motion the parties entered into a stipulation dated January 10, 1949, that the suit be discontinued without costs, and upon that stipulation the action was dismissed without costs by the order of the court January 17, 1949. (R. 14, 38-46).

On March 1, 1950, plaintiffs filed their third complaint on the present cause of action, to which defendant on April 24, 1950 filed its answer and cross-complaint, and a reply by plaintiffs was made June 1, 1950, following which it was stipulated October 31, 1950, that plaintiffs might file an amended complaint, and the answer to the original complaint should stand as an answer to the amended complaint, and thereafter on December 11, 1950, the plaintiffs, with leave of the court, filed their second amended complaint, (R. 3-10), to which defendant filed its amended answer and cross-complaint December 15, 1950, and the plaintiffs their reply on December 18, 1950, (R. 10-20), and upon the last mentioned pleadings of the parties this action was tried before the court on December 18 and 19, 1950. (R. 49-131).

Thereafter on January 9, 1951, the District Court made and entered its findings of fact and conclusions of law, (R. 21-26), and based thereon its judgment denying recovery to plaintiffs on their action and to defendant on its cross-action and awarding costs to defendant. (R. 27-30). From that final judgment denying plaintiffs and the defendant their respective relief, notice of appeal was filed by plaintiffs and defendant on March 8, 1951.

The facts material to a determination of the questions on appeal, as disclosed in the record, may be summarized as follows:

That at or about 4 P. M. on March 9, 1945, pursuant to a verbal understanding and agreement of some years existence between the fire department of the City of Vancouver, Washington, and the Army fire department at Vancouver Barracks, assuring mutual and reciprocal assistance to be rendered each other in time of need, a call was received at the Army Post Fire Station from the city fire department for a government fire truck to stand by at the city fire station while the civilian fire department attended a fire call.

In response to the said call a government fire truck, driven by Corporal Clarence B. Nelson and accompanied by two other enlisted fire fighters was immediately dispatched and proceeded westward along a designated route on West 10th Street in Vancouver, at a speed of approximately thirty miles per hour with its red light lit and fire siren being sounded continuously. When the fire truck reached the intersection of 10th and Washington Streets, the latter an arterial street, its speed was reduced to about 25 miles per hour, and without stopping or observing any obstructing traffic the fire truck proceeded to cross

said intersection and had reached the center thereof when a state patrol car going southward enroute to headquarters also proceeded into the center of said intersection, and its left rear was struck by the fire truck and the impact knocked the patrol car some 20 feet, throwing the patrolman out of the car and injuring him to the extent of the amount of compensation paid to him by the state, \$3,671.56 on his assigned claim, and such collision damaging the fire truck in the sum of \$60.76, the amount of repairs required on that account.

The driver of the fire truck, without tarrying at the scene of the accident proceeded, on his orders, the distance remaining to the city fire station, and upon arrival "dispatched the ambulance out to pick up the patrolman". (R. 103).

QUESTIONS PRESENTED

1. Was the Army fire truck, dispatched to the city's assistance upon summons by the Vancouver Fire Department to stand by at city fire station while city fire equipment answered a fire call, responding to an "emergency" call within the meaning of the Washington law?

2. Was the failure of Eldon Parke, State Patrolman, to bring his car to a stop and yield the

right of way after first hearing a siren some 200 feet north of the intersection and nevertheless proceeding on into the intersection of W. 10th and Washington Streets in the city of Vancouver, Washington, enroute to his headquarters, the proximate cause of the accident and resulting damages when his car so proceeding was struck at the intersection by the Army fire truck bearing a front red light and sounding its siren while enroute to the city fire station as a standby fire truck?

3. Aside from the nature of call being answered by the Army fire truck with regard to question of emergency, was the state patrolman guilty of contributory negligence when he heard the siren of a fire truck before he reached the intersection and notwithstanding failed to heed its warning or to do anything to avoid the impending accident?

4. Under Rule 41(b) of the Federal Rules of Civil Procedure for District Courts, did a dismissal of a prior complaint between the same parties on the same cause of action, when it was not otherwise specified in the order of dismissal, operate as an adjudication upon the merits, and render the same matters alleged in plaintiffs' second amended complaint herein *res adjudicata*?

STATEMENT OF POINTS

I.

That the United States is entitled to recover the amount of its damages claimed in its cross-action.

II.

That the District Court erred in concluding that the United States was not entitled to recover judgment on its cross-action, and in refusing to grant judgment thereon in the amount of \$60.76 the amount of damages found by the court.

III.

That the plaintiffs, appellants, and cross-appellees herein, are not entitled to recover on their cause of action herein for each and all of the following and separate reasons, namely:

1. That defendant's fire truck was an emergency vehicle, as defined by law, on an emergency call and was entitled to the right of way, and the failure and neglect of plaintiffs' vehicle to yield the the right of way was the proximate cause of the accident.

2. That regardless of the nature of the call being answered by defendant's fire truck, plaintiffs'

driver was guilty of contributory negligence when he heard the siren and failed to observe the fire truck and failed to do anything to avoid the accident.

3. That the cause of action set up by plaintiffs in their present action was heretofore dismissed in a prior action between the same parties, and pursuant to Rule 41(b) of Federal Rules of Civil Procedure, such dismissal, not otherwise specified in the order, operated as an adjudication upon the merits, and the matters alleged in the complaint are and have become *res adjudicata*.

ARGUMENT

1. THE ARMY FIRE TRUCK, WHEN DISPATCHED TO THE CITY'S ASSISTANCE UPON SUMMONS BY THE VANCOUVER FIRE DEPARTMENT TO STAND BY AT CITY FIRE STATION WHILE THE CITY FIRE EQUIPMENT ANSWERED A FIRE CALL, WAS ACTUALLY RESPONDING TO AN EMERGENCY CALL WITHIN THE MEANING OF THE WASHINGTON LAW.

Since there is a lack of judicial construction of the pertinent statutes of Washington enacted in 1937 and made applicable and uniform throughout the state, as provided by Rem. Rev. Stat. Section 6360 - 2, it appears necessary to review prior decisions of the Supreme Court of Washington, as well

as cases beyond its jurisdiction in order to see what meaning has been given to the term, "responding to an emergency call" and similar language expressing response to urgency.

The pertinent portion of Section 6360-5 of Rem. Rev. Stats. of Washington, applicable to this case, reads as follows:

"The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:

(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: Provided, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: Provided, further, The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized; * * *."

In 1925, prior to the above enactment, the Supreme Court in *Hadley v. Arms & Scott*, 136 Wash. 632, at page 634 observed:

“There is an ordinance of Seattle that gives fire apparatus, when responding to emergency fire calls, the right of way over all streets. There is, also, an ordinance requiring all vehicles, upon the approach of fire apparatus to go to the nearest right hand curb and stop parallel with the curb.”

And in *Benefiel v. Eagle Brass Foundry*, 154 Wash., 330, at page 332, the Supreme Court quoted and discussed traffic Ordinance No. 53223 of the City of Seattle, and the pertinent section, as follows:

“Section 22. Right of Way: Vehicles of the fire department, when going to, on duty at, or returning from a fire, shall have the right-of-way over all vehicles and persons. Every operator of a vehicle upon the approach of the apparatus of the fire department, shall immediately proceed to the right hand curb and come to a full stop standing parallel thereto, * * *

It shall be unlawful for any person operating any vehicle, street car, locomotive or railroad car, in or upon any street, or for any person standing or walking in any such street, to fail, refuse or neglect to allow the right-of-way to apparatus or members of the fire department, when the same is *going to, on duty at, or returning from a fire.*” (Italics ours).

After discussing former decisions covering the governmental status of firemen and that speed laws were not applicable to such officials, the Supreme Court, at page 334 stated:

“Following the rule laid down by these cases, and subject to the limitations therein pointed out,

we conclude that persons in control of fire apparatus belonging to a regularly established fire department are not, in using the streets of their city in responding to fire alarms, bound by the speed limits fixed by ordinance for ordinary traffic."

This court in 1918 in the case of *Puget Sound Electric Ry. v. Benson*, 253 Fed. 710, construed a prior Seattle ordinance containing the term "emergency calls" and at page 711 thereof had this to say:

"All alarms of fire are emergency calls, and police patrol wagons are brought into service whenever their use is thought to be convenient. So that the supposed qualifying words "responding to emergency calls" would seem to be redundant and useless as applying to these antecedents. They have a peculiar fitness, however, when applied to ambulances. When acting under emergency, it is essential that ambulances move swiftly until the call has been attended to, without reference to the direction in which they are required to travel, whether to or from; hence the need of according them the right of way upon the streets until the emergency has been met. Otherwise, ambulances are to be afforded no greater privileges upon the streets than other vehicles. On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance."

The reasoning of this court in the *Benson case*, *supra*, should be as applicable now as then.

Taking up plaintiffs' cases cited in support of their specifications of errors, we agree with plaintiffs' conclusion that none of their cases quoted in their brief are fully in point.

Plaintiffs in their Brief at page 18, cite and quote from the case of *Lucas v. City of Los Angeles*, 10 Cal. (2d) 476, 75 P. (2d) 599. It is interesting to note that the two cases relied on by the Supreme Court of California, and quoted in that quoted part of the opinion, as illustrative of arbitrary exercise of privileges, involve instances where the operator of the police car was "cruising" around and not on patrol duty. In each instance it was held to be a question for the jury to decide whether or not the police officer was responding to an "emergency" call at the time the accident happened.

Plaintiffs in their first specification of error seem to question the authority of the Army to send a fire truck into the confines of the city without express authority for so proceeding.

While there is nothing in plaintiffs' pleadings or evidence to establish that Corporal Clarence B. Nelson, driver of the Army fire truck was acting

within the scope of his office or employment, as would, pursuant to the Federal Tort Claims Act, 28 U.S.C. 931 et seq., show consent of the government to be sued under the doctrine of respondeat superior, still the plaintiffs cannot take the position that the driver was on an unauthorized trip in order to establish that he did not have the right of way, and at the same time ask that the government be held liable for acts done in the scope of employment.

In *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791, also cited in plaintiffs' Brief, the Supreme Court of Utah, in discussing an accident involving a stand-by fire truck from a substation going to the central station, at page 794 of its decision, stated:

"Whereas, here a municipality exercises governmental functions in operating fire apparatus, and a statute is passed for the purpose of regulating the speed of vehicles generally, it will not be assumed that the regulation was intended to apply to the operation of such fire apparatus unless such intention is couched in express terms or is manifested by necessary or unavoidable implication. Fire trucks are used for special purpose only, and are not used or intended to be used upon the streets or highways for either pleasure or business purposes, and hence, do not come within the designation of ordinary vehicles."

The same is true even though the fire attended by a city fire department is outside the city limits.

See *McCarthy v. Mason*, 171 A. 256.

The Supreme Court of Wyoming in *White v. City of Casper*, 249 P. 562, in reviewing exemptions similar to the Washington Statute, summed up the case for fire protection in its concluding remarks:

“We think that the exemption mentioned in the Statute above quoted contemplates that an actually existing fire in the city is an emergency which justifies excessive speed, and that the men operating the fire department may construe it to be such. Whether a fire in a city is or is not of a grave character cannot, in many cases, be determined in the first instance. It may or may not be, depending on many different circumstances. A fire that at a casual glance would appear insignificant might, under favorable conditions, be turned into a conflagration. We cannot believe that the Legislature intended that the character and extent of the fire must, in order to justify excessive speed, be determined beforehand — and that at the peril of the city.”

2. THE FAILURE OF ELDON PARKE, STATE PATROLMAN, TO BRING HIS CAR TO A STOP AND YIELD THE RIGHT OF WAY AFTER FIRST HEARING A SIREN SOME 200 FEET NORTH OF THE INTERSECTION AND NOTWITHSTANDING PROCEEDING ON INTO THE INTERSECTION OF W. 10th AND WASHINGTON STREETS IN THE CITY OF VANCOUVER, WASHINGTON, ENROUTE TO HIS HEADQUARTERS, WAS THE PROXIMATE CAUSE OF THE ACCIDENT AND RESULTING DAMAGES, WHEN HIS CAR SO PROCEEDING WAS STRUCK IN THE INTERSECTION BY THE ARMY FIRE TRUCK SHOWING A FRONT RED LIGHT AND SOUNDING ITS SIREN WHILE ENROUTE TO THE CITY FIRE STATION AS A STANDBY FIRE TRUCK.

On cross-examination (R. 82-83), witness Parke testified as follows:

- “Q. Mr. Parke, you say that when you were here (indicating) you first heard the siren in this position (indicating) number one?
- A. No, I believe that is when I first saw the truck. When I first heard it, it would have been two hundred feet north of there.
- Q. Farther this way? A. Yes, sir.
- Q. Then what did you do when you first heard this siren?
- A. I looked to see where it was coming from, to locate it.
- Q. You didn't move, then, to the side and park?
- A. No.”

Here was a state patrolman who, far above the ordinary individual, knew the importance of a siren, and yet he testified that the effect of the siren upon him was negative, except that it caused him to look to see if he could detect its source.

In the foregoing connection there is also a Washington Statute which provides for safety when a siren is heard by a driver of a vehicle. This is Section 6360-93 of Remington's Revised Statutes, the pertinent portion of which is as follows:

"Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right of way, and shall immediately drive to a position parallel to, and as close as possible to the right hand edge or curb of the public highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a peace officer."

There is nothing in the foregoing statute which authorized the state patrolman returning to headquarters to determine whether or not the siren belonged to a vehicle answering an emergency call or to otherwise inquire into its character and position.

When the patrolman heard the siren in time to do so, and failed to comply with the statute requiring him to stop, he was guilty of negligence, and for

such reason was liable to defendant, the owner of the fire truck, for its damages, and the defendant was entitled to recover the same on its cross-action and judgment should have been entered in the amount thereof in addition to defendant's costs of action.

We cannot agree with plaintiffs' statement at the bottom of page 23 of their Brief, namely, "Parke had entered the intersection before he heard a siren. (Tr. 75)," when his testimony indicated distinctly that he first heard it some distance before the intersection. (R. 82).

The plaintiffs' driver "knew, or in the exercise of ordinary prudence should have known of the approach of such fire apparatus, in time to have allowed said right of way," and by reason thereof the failure to allow the right of way was negligence and as a proximate result, defendant incurred damages to its fire truck.

See *Balthasar v. Pacific Electric Ry. Co.*, 202 P. 37, 41.

Plaintiffs cite cases in their Brief as instances of the negligence of the driver of the fire truck, none of which appear applicable here.

In *Muhs v. Fire Ins. Salvage Corp. of Brooklyn*, 85 N.Y. Supp. 911, cited by plaintiffs, the fire patrol

wagon was driven as fast as the horses could gallop, according to witnesses to the accident, and there was no attempt made to slacken their speed until the collision was imminent, and a policeman, rescuing a woman and child from a crosswalk was struck.

The evidence here is to the effect that the defendant's driver did slacken his speed as he approached the intersection involved.

Again, in *Ferraro v. Earle et al*, 105 Vt. 243, 164 Atl. 886, where the trial court's instruction was to the effect the fire truck must obey a traffic signal the same as others, the Supreme Court of Vermont reversed the judgment on verdict in favor of driver of the car in which the plaintiff was a passenger, and remanded the cause.

We fail to see where, in the absence of evidence in support thereof, the cases cited by plaintiffs can establish that defendant's driver did not operate the fire truck with due regard for the safety of others, and the patrolman in particular, "the only fact questions being whether there was an emergency call, whether statutory warning of vehicle's approach was given, and whether operator arbitrarily exercised his statutory privileges."

Coltman v. City of Beverly Hills, 105 P. (2d) 153.

3. ASIDE FROM THE NATURE OF CALL BEING ANSWERED BY THE ARMY FIRE TRUCK WITH REGARD TO QUESTION OF EMERGENCY, THE STATE PATROLMAN WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN HE HEARD THE SIREN OF THE FIRE TRUCK BEFORE HE REACHED THE INTERSECTION AND NOTWITHSTANDING FAILED TO HEED ITS WARNING OR TO DO ANYTHING TO AVOID THE IMPENDING ACCIDENT?

In addition to cases and statutes heretofore cited and quoted, which are applicable here, the case of *Hartnett v. Standard Furniture Co.*, 162 Wash. 655 affords a similar example as here of contributory negligence on the part of the private motorist. There at page 667, the court said:

"It follows that, even if the green light invited him (the motorist) to enter the intersection (the verdict reflects the refusal of the jury to accept that testimony as true) the danger of collision was so apparent it was the duty of appellant (motorist) to yield the right of way. Though the vehicle on which respondent was riding was not a fire truck upon a pressing errand, the situation depicted by appellant's driver is one where it was the duty of such driver, though entitled by ordinance or statute to the right of way, to yield the right of way to the approaching vehicle."

The quotation in plaintiffs' Brief at page 25, from the case of *City of Lansing v. Hathaway*, 280

Mich. 87, 273 N.W. 403 involving a collision between a fire truck and a private automobile does not reveal the true situation, as summarized in headnote 2 of the decision, namely:

“A motorist was not liable for injuries sustained by firemen and for damage to fire truck which collided with automobile at street intersection where, at time of collision, there was a severe rainstorm and motorist proceeded with green light in his favor and had no warning of approach of fire truck, which proceeded with red light against it.”

Certainly, it cannot be said that Eldon Parke's failure to heed the siren's warning can be assessed against the elements.

See also, *Russell v. Nadeau*, 29 A. (2d) 916.

4. UNDER RULE 41(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS, A DISMISSAL OF A PRIOR COMPLAINT BETWEEN THE SAME PARTIES ON THE SAME CAUSE OF ACTION WHEN IT WAS NOT OTHERWISE SPECIFIED IN THE ORDER OF DISMISSAL, OPERATED AS AN ADJUDICATION UPON THE MERITS, AND RENDERED THE SAME MATTERS ALLEGED IN PLAINTIFFS' PRESENT COMPLAINT HEREIN RES ADJUDICATA.

The effect of an involuntary dismissal is set forth in Rule 41(b) as follows:

“Unless the court in its order for dismissal

otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

The District Court in *Cornell v. Chase Brass & Copper Co., Inc.*, 48 F. Supp. 979, 981, in discussing dismissals under Rule 41(a) stated:

"That rule distinguishes between dismissals by notice and dismissals by stipulation. A notice or a stipulation of dismissal which is silent on the question of prejudice is made to operate without prejudice. After one dismissal by plaintiff the Rule provides that only a dismissal by notice shall operate as an adjudication. There is nothing in the Rule to indicate the parties may not, in such event, expressly stipulate that the dismissal shall be without prejudice."

A conceded dismissal pursuant to motion of defendant made under Rule 41(b) should not be held, it is contended, to conform to any method of dismissal provided for in Rule 41, and for such reason should operate as an adjudication upon the merits.

The rule intended involuntary as well as voluntary dismissals to so operate on the merits. It would, therefore, appear strange to defendant to consider that this rule contemplated that dismissal pursuant to a motion for dismissal on grounds not conceded by plaintiff would result in a determination on the merits and on the other hand if conceded or stipulated

therefor by plaintiff, the same would not be considered determination or dismissal on the merits.

CONCLUSION

The soldier driver delivered the standby fire truck to the City of Vancouver, equipped for fire fighting and pursuant to call for aid.

The run to the city fire station was made at a busy hour on a route that traversed the congested area of the city with the result that only one vehicle contested the right of way of the fire truck, namely, the driver of the state car, a state patrolman, who heard the siren and did nothing about stopping or parking his vehicle.

For the foregoing and allied reasons herein appearing it is contended that the judgment of the court below denying plaintiffs' relief on their action and awarding costs to defendant should be affirmed, and in so far as it denies relief to defendant on its cross-action that part should be reversed and judgment granted for defendant thereon in the amount of its claim.

Respectfully submitted,

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STATE OF WASHINGTON, A Sovereign State, and
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} No. 12895.

UPON APPEAL FROM THE UNITED STATES DIS-
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**REPLY BRIEF OF APPELLANTS
AND CROSS-APPELLEES**

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REPLY BRIEF OF APPELLANTS^①
AND CROSS-APPELLEES

1. Reply to Defendant's First Argument.

Defendant in its first argument cites and quotes from
Hadley v. Arms & Scott, 136 Wash. 632, 241 Pac. 26, and

^① Since consolidated cross-appeals are involved herein, the several parties are referred to in this brief, for the purposes of convenience and avoidance of confusion, by their respective designations in the court below, that is, the State of Washington, and Smith Troy, Attorney General of the State, are referred to herein as "plaintiffs" and United States of America, defendant, and cross-complainant below, is referred to herein as "defendant."

Benefield v. Eagle Brass Foundry, 154 Wash. 330, 282 Pac. 213. Both of these cases involve the interpretation of city ordinances of Seattle, Washington, and are not in point upon the question of the interpretation of Rem. Rev. Stat., § 6360-5, which is the question before the court upon this appeal.

Defendant quotes from *Puget Sound Electric Ry. Co. v. Benson*, 253 Fed. 710 to support its contention that a fire truck while returning to the fire station after having answered a fire alarm is nevertheless responding to an emergency call. It is contended that "The reasoning of this court in the *Benson* case, *supra*, should be as applicable now as then."

Part of the quotation relied upon by defendant to support this contention is found at page 711 of the *Benson* case, *supra*, as follows:

" * * * On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or *making ready to meet the exigencies of another*, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance." (Emphasis supplied.)

The Washington statute bestowing immunities from the rules of the road upon authorized emergency vehicles under certain conditions (Rem. Rev. Stat., § 6360-5) makes explicit provision as to when these immunities will be extended as follows:

"The provisions of this act shall be applicable to the operation of any and all vehicles upon the

public highways of this state except that they shall not apply in the following cases:

“(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or *in immediate pursuit of an actual suspected violator of the law*, within the purpose for which such emergency vehicle has been authorized: * * *.” (Emphasis supplied.)

It cannot be contended that under the above quoted statute a police vehicle “making ready to meet the exigencies of another” emergency, as was stated in the *Benson* case, *supra*, is entitled to the immunities afforded by this statute. By analogous reasoning a fire engine “making ready to meet the exigencies of another” emergency is not “*actually responding to an emergency call*” (emphasis supplied), and it is submitted that the reasoning of the *Benson* case, *supra*, is not “as applicable now as then.”

At page 12 of defendant’s brief, it is stated that the plaintiff in its first specification of errors seems to question the authority of the army to send a fire truck into the confines of the city without express authority for so proceeding. The defendant misconceives the plaintiff’s first specification of errors as that specification speaks not of an “unauthorized” trip but only of an “emergency” trip.

The case of *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791, is cited in defendant’s brief at page 13 for the proposition that statutes regulating the speed of vehicles generally are not applicable to fire trucks. This case was cited in the plaintiff’s brief as illustrative of the common law rule that any municipal corporation which owns and operates a fire truck is not liable for damage negligently inflicted by such fire truck, for the municipal corpora-

tion enjoys the immunity of the sovereign. It is submitted that this case is not in point on the question of the interpretation of the Washington statute here in question.

The case of *White v. City of Casper*, 35 Wyo. 371, 249 Pac. 562, is quoted in defendant's brief at page 14, as follows:

"We think that the exemption mentioned in the Statute above quoted contemplates that an actually existing fire in the city is an emergency which justifies excessive speed, and that the men operating the fire department may construe it to be such. Whether a fire in a city is or is not of a grave character cannot, in many cases, be determined in the first instance. It may or may not be, depending on many different circumstances. A fire that at a casual glance would appear insignificant might, under favorable conditions, be turned into a conflagration. We cannot believe that the Legislature intended that the character and extent of the fire must, in order to justify excessive speed, be determined beforehand—and that at the peril of the city."

The plaintiff has no argument with the above quoted statement of the Wyoming Supreme Court. At the trial of this cause in the district court the driver of the army fire truck on cross-examination testified as follows:

"Q. (By Mr. Nelson): Mr. Nelson, at the time you received the message at the fire house to take the fire truck out of this Army fire house, you did not think at that time that you were going to a fire, did you?

"A. I knew I wasn't going to a fire. It was stand-by.

"Q. You knew that you were going to the Vancouver Fire Station to stand by?

"A. Yes." (Tr. 107.)

2. Reply to Defendant's Second Argument.

It is contended by the defendant that Eldon Parke, the driver of the state patrol vehicle, heard the siren of

the fire engine in time to have avoided the collision at the street intersection. On cross-examination Mr. Parke testified as follows:

"Q. Mr. Parke, how much time interval was there from the time you first heard a siren until you were struck by the truck?

"A. It would have been a matter of a very few seconds; just seconds of time." (Tr. 83.)

The court in its oral findings and decision states:

"The patrol car was on an arterial and it was in the favored position with reference to traffic approaching from its left. The patrol car driver says he didn't hear and I shall find that he didn't hear, the siren and didn't see the red flashing light on the Army fire truck." (Tr. 126.)

The case of *Ferraro v. Earle et al.*, 105 Vt. 243, 164 Atl. 886, is cited by defendant at page 18 of its brief and it is pointed out by the defendant that in that case the trial court's instruction was to the effect the fire truck must obey a traffic signal the same as others, but the Supreme Court of Vermont reversed the judgment on verdict in favor of the driver of the car in which the plaintiff was a passenger and remanded the cause. A reading of this case discloses that the statute there under consideration gave ambulances, police department and fire department vehicles *carte blanc* right of way over all other vehicles and the case is not in point upon the questions involved on this appeal.

The plaintiff agrees with the quotation from *Coltman v. City of Beverly Hills*, 409 Cal. App. (2d) 270, 105 P. (2d) 153, set out in defendant's brief at page 18. In this case the court states at page 154:

"* * * The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an

emergency call is not whether an emergency in fact exists at the time but rather whether the vehicle is then being used in responding to an emergency call. Whether the vehicle is being so used depends upon the nature of the call that is received and the situation as then presented to the mind of the driver."

3. Reply to Defendant's Third Argument.

It is contended by defendant that the driver of the state patrol vehicle was contributorily negligent in not avoiding the collision at the intersection. In support of this contention defendant quotes from *Hartnett v. Standard Furniture Co.*, 162 Wash. 655, 299 Pac. 408. The facts in the cited case were quite different from those in the case at bar. In the cited case a furniture truck was in collision at a street intersection with a fire truck which was responding to a fire alarm. In speaking of the driver of the furniture truck, the court stated at page 665:

" * * * He testified that, when he arrived at the intersection, he looked to the east and to the west on Sixty-Fifth street and did not see the fire truck. It is inconceivable that had he looked he would not have seen that truck. That vehicle was plainly visible for a distance of three blocks to the west a few seconds prior to the time the furniture truck attempted to cross the intersection. * * * ."

4. Reply to Defendant's Fourth Argument.

Defendant contends that this cause of action was dismissed on January 17, 1949, pursuant to stipulation of the parties, and that such dismissal operated as an adjudication upon the merits pursuant to Rule 41(b), Federal Rules of Civil Procedure.

This dismissal was voluntary and was pursuant to an order of the court based upon the stipulation of the parties. (Tr. 45.)

The case of *Cornell v. Chase Brass & Copper Co., Inc.*, 45 F. Supp. 979, which is cited by defendant at page 21 of its brief, seems to be decisive upon the question of the effect of a dismissal pursuant to stipulation. Rule 41(a) governs voluntary dismissals and speaking of this rule the court in the cited case stated at page 981:

“ * * * That rule distinguishes between dismissals by notice and dismissals by stipulation. A notice on a stipulation of dismissal which is silent on the question of prejudice is made to operate without prejudice. After one dismissal by plaintiff the rule provides that only a dismissal by notice shall operate as an adjudication. * * * .”

It should be pointed out that this cause of action was never, prior to January 17, 1949, dismissed by the plaintiff and it is submitted that the dismissal of this cause on January 17, 1949, pursuant to stipulation of the parties, did not become an adjudication upon the merits by Rule 41(b).

CONCLUSION

The army fire truck raced through the busy streets of the City of Vancouver, Washington, disregarding arterial stop signs and other rules of the road, in order that it might be present at the Vancouver fire station to answer an alarm of fire were one to be made. The fire truck was not actually responding to an emergency alarm within the purposes for which the fire truck was designated, and was not immune from the rules of the road. The state highway patrol car was in the favored position, and the defendant is liable for the damages inflicted by its fire truck.

Respectfully submitted,

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HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on December 30, 1950 lodged with the Clerk of the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus in forma pauperis (Tr. 1 - 9), whereupon the District Court

on January 10, 1951, directed the petition to be filed and ordered appellee to supply its deficiencies and to produce the body of the petitioner before the court on January 23, 1951, and to show cause of his detention, which matter was duly continued for hearing to January 30, 1951 (Tr. 10 - 13).

To the Order to Show Cause appellee served and filed a response on January 26, 1951 (Tr. 14 - 20) and produced in court the body of appellant at the hearing on January 30, 1951, together with the trial records therein ordered by the court (Tr. 21 - 36) at which time appellant filed his written motion for the appointment of counsel in his behalf (Tr. 37 - 38) and upon denial thereof entered his oral traverse to the return, confining the issue to the question of the number of offenses committed in bringing into the United States four unauthorized aliens on the same day, and the legality of confinement in a penitentiary on sentence of one year for offense punishable by imprisonment not exceeding five years (Tr. 39 - 44) and at which hearing the facts set forth below were adduced, and based thereon, an order denying appellant's petition was entered February 2, 1951 (Tr. 45 - 46). From that final order appellant has brought this appeal (Tr. 47 - 52).

The facts material to a determination of appellant's right to discharge, as disclosed in the record, may be summarized as follows:

Appellant was indicted upon four (4) counts of an indictment charging singly in each count the illegal bringing into the United States of an alien person as named therein, in violation of Title 8, U.S.C.A., Section 144 (Tr. 21 - 22), was tried and found guilty by jury on all four counts (Tr. 23 - 30), and on June 22, 1950 was sentenced to imprisonment for one year and a fine of \$500.00 on Count 1; one year and a fine of \$500.00 on Count 2, consecutively, to begin and run upon the expiration of sentence on Count 1; one year and a fine of \$1.00 on Count 3, to begin and run concurrently with sentence on Count 1; and on Count 4 imposition of sentence was suspended and defendant placed on probation for five years, and to stand committed (Tr. 31 - 33).

Appellant was committed to the United States Penitentiary at McNeil Island, on July 7, 1950, sentence having begun at time of imposition June 22, 1950, and according to institutional computation will be eligible for conditional release on January 29, 1952, in the event the committed fine is paid (Tr. 41).

QUESTIONS PRESENTED

1. Is the question of whether the Smuggling Aliens Statute creates separate offenses as to each of four aliens smuggled in allegedly at one time, or merely creates an augmented penalty therefor, a matter within the scope of habeas corpus proceedings?

2. Did the denial of appellant's motion for assistance of counsel by the District Court in the proceedings below render the hearing unfair?

3. Is appellant's confinement in the penitentiary on a sentence of one year for offense punishable by imprisonment not exceeding five years, legal?

ARGUMENTS AND AUTHORITIES

1. THE QUESTION OF WHETHER THE SMUGGLING ALIENS STATUTE CREATES SEPARATE OFFENSES AS TO EACH OF FOUR ALIENS BROUGHT IN TO THE UNITED STATES ALLEGEDLY AT ONE TIME OR WHETHER IT MERELY CREATES AN AUGMENTED PENALTY THEREFOR IS NOT A MATTER WITHIN THE SCOPE OF HABEAS CORPUS.

The statute involved in this proceeding is Title 8, U.S.C.A., Section 144, which provides as follows:

"Bringing in or harboring or concealing certain aliens.

Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in. Feb. 5, 1917, c. 29, Sec. 8, 39 Stat. 880."

In *United States v. Martinez Gonzales*, 89 F. Supp. 62, the District Court held a single count indictment duplicitous which charged the defendant with the smuggling into the United States of four aliens. In that case, the District Court reasoned at page 65 of the decision, as follows:

"Under the section there is not a general punishment for the act of bringing in or attempting to bring in aliens, as pointed out, but a separate mandatory punishment is required to be imposed on a defendant for each alien brought in or attempted to be brought in. *Therefore, such conduct is a separate crime with separate punishment as to each alien and must be separately charged in different counts of an indictment.*" (Italics ours).

At page 65, the court further observed:

“One of the tests to determine whether or not one crime is necessarily included in another is whether or not an acquittal of one bars prosecution of the other. * * * Obviously, an acquittal of the defendant for the crime of bringing in any one of the four aliens could not bar prosecution for bringing in the other three.”

And it might be added that after the court pronounced one sentence for smuggling in one alien, the court did not lose jurisdiction to sentence defendant for another alien brought in, if we read the statute correctly.

Speaking of the wording of the clause in the Statute, “for each and every alien,” the Supreme Court in *United States v. Evans*, 333 U. S. 483, at page 494, in discussing the application of the smuggling penalty to the conduct of “concealing and harboring”, also condemned by the statute, had this to say:

“The clause’s function was solely to augment the penalty when more than one alien was involved. That function was not changed when the new offenses were added.”

Whether the reasoning of the District Court in the *Martinez Gonzales* case, *supra*, as to separate punishment creating separate offenses is the correct interpretation of the statute, or the augmented pen-

alty is to be taken as creating an offense of the nature of grand larceny as opposed to petit larceny in its application to the number of aliens smuggled in, the number of the counts in the indictment would appear to be unharmed to the appellant, since the number of sentences are the cause of his detention, and complaint, and they are clearly in conformity with the statute.

While earlier pleadings under this statute, as revealed by the indictment in *Serentino v. United States*, 36 F. (2d) 871, may have undertaken to observe the construction placed upon somewhat similar conduct arising out of mail theft, 18 U.S.C.A. 317, and the White Slave Traffic Act, 18, U.S.C.A. 398, in their measure of what constituted a single offense, yet it should be borne in mind that such statutes provided only for a general punishment.

It is our contention that the District Court's view is amply supported, even though the term "augment the penalty" was used by the Supreme Court, where at page 64, the District Court in the *Martinez Gonzales* case, *supra*, held and cited authority therefor:

"It is the punishment prescribed which makes an act a crime, not a mere interdiction of conduct without punishment. There is no better illustration of this principle than the opinion of

the Supreme Court in *U. S. v. Evans*, 333 U.S. 483, 68 S. Ct. 634, 92 L. Ed. 823, where the court held, in construing this identical section, that the harboring or concealing of an alien was not a crime because no punishment was prescribed for that conduct."

Aside from the foregoing consideration, it is appellee's contention that the questions of pleading herein involved are matters for review and not for habeas corpus proceedings, and as found by the court below, "the sufficiency of the evidence whereby the jury convicted petitioner was reviewable on appeal, but cannot be tested in these proceedings to effect the discharge of the petitioner from confinement after his conviction, the scope of review on habeas corpus being limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged." (Tr. 42)

See *Carpenter v. Hudspeth*, 112 F. (2d) 126.

2. THE DENIAL OF APPELLANT'S MOTION FOR ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW DID NOT RENDER THE HEARING UNFAIR.

The learned jurist in the court below is a judge of long experience in habeas corpus proceedings, and well qualified thereby to observe that in such matters the applicant could better represent himself than be represented by some member of the bar, unac-

quainted not only with the facts in his case, but, perhaps with the procedure itself.

The framers of the Constitution did not feel the necessity for including in the provision for assistance of counsel any assistance that might be required in the effort of the accused to continue his defense after conviction.

See U. S. Constitution, Amendments 5, 6;

Stidham v. U. S., 170 F. (2d) 294;

Brown v. Johnston, 91 F. (2d) 370, cert. den. 302 U.S. 728; ..

Dorsey v. Gill, 148 F. (2d) 857, cert. den. 325 U.S. 890;

Ex parte McBride, 68 F. Supp. 139;

Petition of Wilson, 68 F. Supp. 168.

3. APPELLANT'S CONFINEMENT IN THE PENITENTIARY ON A SENTENCE OF ONE YEAR FOR OFFENSE PUNISHABLE BY IMPRISONMENT NOT EXCEEDING FIVE YEARS IS IN ALL RESPECTS LEGAL.

Title 18, U.S. Code, Section 4083, which provides for penitentiary imprisonment and consent when required, provides as follows:

"Persons convicted of offenses against the United States or by courts martial and sentenced to terms of imprisonment of more than one year may be confined in any United States Penitentiary. A sentence for an offense punishable by

imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant."

The appellant was convicted of an offense punishable by sentence of imprisonment not exceeding five years on any one count, and he has not, therefore, been deprived of any rights by his confinement in the penitentiary upon sentences of one year on each of three counts.

As stated in *Brooks v. Steele*, 177 F. (2d) 782, at page 785:

"The statute makes distinction between two classes of offenses by the extent to which the offenses are respectively made punishable. It does not attempt to classify offenders according to different punishment that may have been meted out to them."

CONCLUSION

The appellee, therefore, contends that for the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
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GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellee.

No. 12907

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, AFFILI-
ATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATIONS; INTER-
NATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34 and LOCAL 34:
MARINE CLERKS ASSOCIATION, LOCAL
1-63, and SUPERCARGOES AND CHECK-
ERS UNION, LOCAL 40, Each Affiliated
with the INTERNATIONAL LONGSHORE-
MEN'S & WAREHOUSEMEN'S UNION,
C.I.O.,

Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

DEC 12 1951

PAUL P. O'BRIEN

CLERK

No. 12907

United States
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NATIONAL LABOR RELATIONS BOARD,
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INTERNATIONAL LONGSHOREMEN'S AND
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NATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34 and LOCAL 34;
MARINE CLERKS ASSOCIATION, LOCAL
1-63, and SUPERCARGOES AND CHECK-
ERS UNION, LOCAL 40, Each Affiliated
with the INTERNATIONAL LONGSHORE-
MEN'S & WAREHOUSEMEN'S UNION,
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Respondents.

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Petition for Enforcement of an Order of the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America Before the National
Labor Relations Board, Twentieth Region

Case No. 20-CB-19

In the Matter of

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, Affiliated with
the CONGRESS OF INDUSTRIAL ORGAN-
IZATIONS

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

Case No. 20-CB-38

In the Matter of

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34, and LOCAL 34;
MARINE CLERKS ASSOCIATION, LOCAL
1-63, and LOCAL 1-40, Each Affiliated with IN-
TERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, C.I.O.

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

COMPLAINT

It having been charged by the Waterfront Em-
ployers Association of the Pacific Coast, an em-

ployer association, that the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, and its affiliated locals, namely, International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34; Marine Clerks Association, Local 1-63; and Local 1-40, herein collectively referred to as respondents, have engaged and are engaging in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, Section 203.15, hereby issues this Complaint upon charges duly consolidated pursuant to the provisions of Section 203.33, of the above Rules and Regulations, and alleges as follows:

I.

Waterfront Employers Association of the Pacific Coast, herein called WEA, a corporation, is and has been at all times material hereto designated by shipping, stevedore and terminal companies whose names are listed in Appendix "A" as their agent for the purposes of bargaining collectively with labor organizations concerning rates of pay, wages, hours or employment, and other conditions of em-

employment of their respective employees in the unit described in paragraph IV below.

(a) Waterfront Employers Association of California, a corporation, is an employer association, acting in concert with WEA and administering the policies of WEA in the State of California, and is and has been at all times material hereto designated by the companies listed in Appendix "A" as their agent for the purposes of bargaining collectively with labor organizations for their respective employees in the units described in paragraphs VII and VIII below.

(b) Waterfront Employers Association of Portland, a corporation, is an employer association, acting in concert with WEA and administering the policies of WEA in the State of Oregon and is and has been at all times material hereto designated by the companies listed in Appendix "A" as their agent for the purposes of bargaining collectively with labor organizations for their respective employees in the unit described in paragraph IX below.

II.

Each of the companies listed in Appendix "A" is engaged in the loading, unloading, or handling of waterborne cargo at various ports on the Pacific coast. Each of said companies, in the course and conduct of its operations as aforesaid, loads, unloads or handles a substantial amount of cargo in the course of transportation between various states of the United States, between the United States and

non-contiguous territories or possessions and between the United States and foreign countries.

III.

International Longshoremen's and Warehousemen's Union, C.I.O., herein called ILWU, and its locals, namely, International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, herein called Local 34; Marine Clerks Association, Local No. 1-63, herein called Local 1-63, and Local 1-40, are labor organizations within the meaning of Section 2, subsection (5) of the Act.

IV.

In order to insure to the employees of the companies, members of WEA, whose names appear in Appendix "A," the full benefit of their right to self-organization and collective bargaining and otherwise to effectuate the policies of the Act, all employees doing longshore work, including longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack turners, side runners, front men, jitney drivers and lift jitney drivers employed by said companies constitute, and at all times material herein did constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

V.

On and before June 6, 1947, a majority of the employees in the unit described in paragraph IV

above, had designated the ILWU as their representative for the purposes of collective bargaining with WEA representing the companies listed in Appendix "A." The ILWU is, and at all times material hereto has been, the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

VI.

At various times since about February 21, 1948, during bargaining negotiations between the ILWU and the WEA with respect to a new collective bargaining agreement covering the employees in the unit set forth in paragraph IV above, the ILWU in the course of such negotiations demanded and insisted that the WEA agree to and execute a new collective bargaining contract with the ILWU providing, among other terms, that:

Section 4. The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union and the respective employers' associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los Angeles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. A branch hiring hall shall be opened in the East Bay area of San Francisco Harbor. All expense of the hiring halls shall be

borne one-half by the International Longshoremen's and Warehousemen's Union and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the International Longshoremen's and Warehousemen's Union shall pay to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the International Longshoremen's and Warehousemen's Union.

Section 5. The personnel for each hiring hall, with the exception of dispatchers, shall be determined and appointed by the Labor Relations Committee of the port. Dispatchers shall be selected by the Union through elections in which all candidates shall qualify according to standards prescribed and measured by the Labor Relations Committee of the port. If they fail to agree on the appropriate standards or on whether a candidate is qualified under the standards, the dispute shall be decided by the Impartial Chairman or, at his discretion, by a Port Arbitrator.

Dispatchers shall hold office for one year and neither the constitution nor any rule of the Union or any of its locals shall abridge the right of a dispatcher to hold office for one year or to run to succeed himself as often as he may choose.

Both the Employers and the Union shall be permitted to maintain a representative in each hiring hall at all times.

Section 10. Subject to the control and direction of the Coast Labor Relations Committee, the duties of the Port Labor Relations Committee shall be:

(a) To maintain and operate the hiring hall;

(b) To have complete control of the registration lists of the regular Longshoremen of the Port including the power to make such additional registrations of the longshoremen as may be necessary; no longshoremen not on such a list shall be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work;

(c) To decide questions regarding rotation of gangs and extra men; revision of existing lists of extra men and of casuals; and the addition of new men to the industry when needed;

(d) To investigate and adjudicate all grievances and disputes relating to working agreements;

(e) To decide all grievances relating to discharges. The hearing and investigation of grievances relating to discharges shall be given preference over all other business before the Committee. In case of discharge without sufficient cause, the Committee may order payment for lost time or reinstatement with or without payment for lost time;

(f) To decide any other question of mutual concern relating to the industry and not covered by this agreement.

VII.

In order to insure to the employees of the com-

panies, members of the Waterfront Employers Association of California, whose names appear in Appendix "A," the full benefit of their right to self-organization and collective bargaining and otherwise to effectuate the policies of the Act, all clerical workers, exclusive of supervisory employees, who receive, deliver, check the loading or discharging, or spot ship's cargo to or from marine terminals, employed in the San Francisco Bay Area, constitute, and at all times material hereto did constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

(a) On and before March 30, 1946, a majority of the employees in the above unit had designated Local 34 as their representative for the purposes of collective bargaining with the Waterfront Employers Association of California. Local 34 is, and at all times material hereto has been, the exclusive representative of all the employees in the above described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

VIII.

In order to insure to the employees of the companies, members of the Waterfront Employers Association of California, whose names appear in Appendix "A," the full benefit of their right to self-organization and collective bargaining and otherwise to effectuate the policies of the Act, all dock checkers, tally clerks, coopers, spotters, and hatch

watchmen, exclusive of supervisory employees, employed in the Los Angeles-Long Beach Harbor area, constitute, and at all times material hereto did constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

(a) On and before November 26, 1946, a majority of the employees in the above unit had designated Local 1-63 as their representative for the purposes of collective bargaining with the Waterfront Employers Association of California. Local 1-63 is and at all times material hereto has been, the exclusive representative of all the employees in the above described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

IX.

In order to insure to the employees of the companies, members of the Waterfront Employers Association of Portland, whose names appear in Appendix "A," the full benefit of their right to self-organization and collective bargaining and otherwise to effectuate the policies of the Act, all checkers, exclusive of supervisory employees, employed in the Oregon-Columbia River District, constitute, and at all times material hereto did constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

(a) On and before July 26, 1946, a majority of the employees in the above unit had designated

Local 1-40 as their representative for the purposes of collective bargaining with the Waterfront Employers Association of Portland. Local 1-40 is, and at all times material hereto has been, the exclusive representative of all the employees in the above described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

X.

At various times since about April 13, 1948, during bargaining negotiations between the ILWU, its affiliated locals and the WEA and/or the Waterfront Employers Association of California and Waterfront Employers Association of Portland with respect to new collective bargaining agreements covering the employees in the units set forth in paragraphs VIII and IX above, the ILWU and its affiliated locals in the course of such negotiations demanded and insisted that the WEA and/or the Waterfront Employers Association of California and Waterfront Employers Association of Portland agree and execute a new collective bargaining contract with the ILWU and its affiliated locals providing, among other terms, for the hiring of employees through hiring hall procedures under the supervision of a union dispatcher, said demand being in substantially the same terms as set forth in paragraph VI above.

XI.

Because of the refusal and failure of the WEA and Waterfront Employers Association of Califor-

nia and Waterfront Employers Association of Portland to agree to the aforementioned demands of respondents, set forth in paragraphs VI and X above, and in order to force the above-named associations to yield to said demands, respondents, about April and May, 1948, directed, instigated, inspired, induced and encouraged employees to engage in a strike or a concerted refusal to perform services for the companies named in Appendix "A" on and after June 15, 1948, the expiration date of the last collective bargaining agreements between respondents and the aforementioned associations. Said respondents were restrained from engaging in such action by the District Court of the United States for the Northern District of California through the issuance of appropriate injunctive relief, pursuant to the provisions of the Act.

XII.

By the acts set forth in paragraphs VI, X and XI hereof, respondents did attempt to cause, and are attempting to cause, the companies named in appendix "A" to discriminate against employees in violation of subsection (3) of Section 8 (a) of the Act, and did thereby engage in and are engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

XIII.

By the acts set forth in paragraphs VI, X and XI hereof, respondents did refuse, and are refusing, to bargain collectively with the WEA and/or the Waterfront Employers Association of California

and Waterfront Employers Association of Portland within the meaning of Section 8 (b) (3) of the Act, and thereby did engage in and are engaging in unfair labor practices within the meaning of said Section 8 (b) (3).

XIV.

By the acts set forth in paragraphs VI, X and XI hereof, respondents did restrain and coerce, and are restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8(b) (1) (A) of the Act.

XV.

The acts of respondents, set forth in paragraphs X and XI hereof, occurring in connection with the operations of the companies, set forth in paragraph II hereof, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and foreign countries, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The acts of respondents, set forth in paragraphs VI, X and XI hereof, constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A), (2) and (3), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by

the Regional Director for the Twentieth Region, on this 20th day of August, 1948, issues this Complaint against International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, and International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Local 1-40, each affiliated with International Longshoremen's and Warehousemen's Union, C.I.O., respondents herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National
Labor Relations Board.

[Admitted in evidence as General Counsel's Exhibit No. 1, September 1, 1948.]

[Title of Board and Cause.]

ANSWER

Come now the respondents herein and pursuant to § 203.20 of the rules and regulations of the National Labor Relations Board file this, their answer to the complaint on file herein, and in support hereof allege as follows:

I.

Answering all of the allegations of paragraphs and II of the said complaint, respondents state that they are without knowledge of the matters

therein contained, and basing their answer thereon, deny the said allegations and demand strict proof thereof.

II.

Respondents deny each and every, all and singular the allegations of paragraph VII of the said complaint, beginning with the words "in order to insure" and ending with the words "Subsection (b) of the Act," and in connection therewith assert that the unit appropriate for collective bargaining for the employees in said paragraph referred to is the unit described in the decision of Elections and Order issued by the National Labor Relations Board on September 28, 1946, in Case No. 20-R-1690, reported at 71 N.L.R.B. 121.

III.

Respondents deny each and every, all and singular the allegations of paragraph VIII of the said complaint, beginning with the words "In order to insure" and ending with the words "Subsection (b) of the Act," and in connection therewith assert that the unit appropriate for collective bargaining for the employees in said paragraph referred to is the unit described in the decision of Elections and Order issued by the National Labor Relations Board on September 28, 1946, in Case No. 20-R-1690, reported at 71 N.L.R.B. 121.

IV.

Respondents deny each and every, all and singular the allegations of paragraph IX of the said complaint, beginning with the words "In order to

insure" and ending with the words "Subsection (b) of the Act," and in connection therewith assert that the unit appropriate for collective bargaining for the employees in said paragraph referred to is the unit described in the decision of Elections and Order issued by the National Labor Relations Board on September 28, 1946, in Case No. 20-R-1690, reported at 71 N.L.R.B. 121.

V.

Respondents deny each and every, all and singular, generally and specifically, the allegations of paragraphs VI, X, XI, XII, XIII, XIV, XV and XVI of said complaint and demand strict proof thereof.

As and for a Separate, Affirmative Defense, respondents allege:

I.

The provisions of §§ 8 (a) (3) and 8 (b) (2) of the National Labor Relations Act, as amended, and said provisions as construed and applied herein impose unreasonable limitations upon respondents' freedom of contract and constitute an invasion of their property rights and of the rights of their members to freedom of speech, press and assembly, and of their right to be free from involuntary servitude, thereby depriving respondents and their members of liberty and property without due process of law, all in violation of the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

II.

The aforesaid sections, and the aforesaid sections as construed and applied, are unreasonable, arbitrary and capricious and have no reasonable relation to the objectives and purposes of the Act, and to the objectives and purposes of collective bargaining and to the objectives and purposes of maintaining commerce free from interference, but on the contrary are so designed and are so sought to be enforced by the National Labor Relations Board as to make impossible the continuation of trade union organization in the stevedoring industry and in the loading, unloading and handling of waterborne cargo, and to abridge and to destroy the rights of employees in the said industry to effective collective bargaining and to deprive the respondents and their members of their liberty and property and to impose involuntary servitude upon them, all in violation of the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

III.

The provisions of §§ 8 (a) (3) and 8 (b) (2) of the Act are void and unenforceable in that they violate on their face the provisions of the First, Fifth and Thirteenth Amendments to the Constitution of the United States by interfering with the freedom of association and of assembly and of speech and of the right of contract and to work of the respondent Unions and the members thereof, by imposing or seeking to impose involuntary servitude upon them.

IV.

As construed and applied, the provisions of §§ 8 (a) (3), 8 (b) (2), 8 (b) (3) and 8 (b) (1) (A) of the said Act are void and unenforceable in that they abridge, or threaten to abridge the right of the respondent Unions and of the members thereof to the free exercise of the rights of free speech, press and assembly, and their right to contract freely for their services and to be free of involuntary servitude, and thus deprive them of liberty and property without due process of law, all in violation of the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

V.

As construed and applied herein, the provisions of §§ 8 (a) (3), 8 (b) (2), 8 (b) (3) and 8 (b) (1) (A) of the said Act constitute a denial of the equal protection of the laws to the respondents herein, in that the said provisions of the said Act are being discriminatorily applied to said respondents and are not being applied to other labor organizations of the same class, character and nature of respondents, who are and have been engaged in the same acts and practices as in the complaint set forth; this discriminatory application of the provisions of the statute is with the knowledge, consent and connivance of the National Labor Relations Board, its agents, officers and attorneys.

Wherefore, respondents pray that the said complaint be dismissed.

Dated September 1, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ NORMAN LEONARD,
Attorneys for Respondents.

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondents herein. That he has read the foregoing Answer and knows the contents thereof. That the same is true of his own knowledge, except as to matters therein stated on information or belief; and as to those matters, that he believes it to be true.

/s/ NORMAN LEONARD.

Subscribed and sworn to before me this 1st day of September, 1948.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Admitted in evidence as General Counsel's Exhibit No. 1-D, September 1, 1948.]

[Title of Board and Cause.]

MOTION FOR LEAVE TO AMEND
COMPLAINT AND AMENDMENT

Comes now counsel for the General Counsel of the National Labor Relations Board and moves for leave to amend the Complaint issues herein by adding thereto paragraphs VI (a) and X (a), as follows:

VI.

(a) The foregoing provision demanded by the I.L.W.U. providing for the hiring of longshoremen through the hiring hall is illegal for the reason that the practices and procedures of the hiring hall in its practical operation are discriminatory in that:

(1) The hiring of all longshoremen must be through the hiring hall operated jointly by the I.L.W.U. and the Employers' Associations.

(2) The dispatching of longshoremen for employment is under the supervision and control of a dispatcher selected by the I.L.W.U.

(3) The Port Labor Relations Committee, composed of an equal number of Employers' Associations and I.L.W.U. representatives, exercises complete control over registration lists of regular longshoremen, including the addition of new persons to the lists.

(4) No longshoreman or applicant for employment is dispatched from the hiring hall or employed

by any employer while there are men on the registered list qualified, ready and willing to work.

(5) Each longshoreman registered upon the lists who is not a member of the I.L.W.U. must contribute to the support of the hiring hall an amount equivalent to that paid by each member of the I.L.W.U.

X.

(a) The provision demanded by the I.L.W.U. providing for the hiring of employees in the units described in paragraphs VII, VIII and IX, through the hiring hall is illegal for the reason that the practices and procedures of the hiring hall in its practical operation are substantially the same as those set forth in paragraph VI (a) and therefore discriminatory.

/s/ REEVES R. HILTON,
Counsel for the General Counsel of the National
Labor Relations Board.

Dated September 3, 1948.

[Admitted in evidence as General Counsel's Exhibit No. 1-E, September 3, 1948.]

[Title of Board and Cause.]

SUPPLEMENTAL ANSWER

Come now the respondents herein and file this, their Supplemental Answer to the Complaint on file herein, and in support thereof allege as follows:

I.

Incorporate herein by reference all of the Answers heretofore filed herein by the respondents on September 1, 1948.

II.

Answering the allegations of Paragraphs VI(a) and X(a) of the said Complaint, as the said Paragraphs were added thereto by the Amendment of September 3, 1948, respondents deny each and every, all and singular, generally and specifically, the allegations of the said Paragraphs and demand strict proof thereof.

As and for a Separate, Further, and Affirmative Defense, Respondents Allege:

I.

That since the issuance of the Complaint herein, more particularly, since on or about the second day of September, 1948, and continuously thereafter to the date hereof, the Waterfront Employers Association of the Pacific Coast has engaged in, and is engaging in, unfair labor practices within the meaning, among others, of §8(a) 5 of the National Labor Relations Act, as amended, by failing

and refusing to bargain collectively with the respondents, or any of them.

II.

That by the acts set forth in the foregoing Paragraph, the Waterfront Employers Association of the Pacific Coast are restraining and coercing employees in the exercise of the rights guaranteed in §7 of the Act and thereby engaging in unfair labor practices within the meaning of §8(a) 1 of the Act.

Wherefore, respondents pray that the said Complaint, together with its Amendment, be dismissed, and for such other and further relief as to the National Labor Relations Board may seem just and proper in the premises.

Dated: September 10, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By /s/ NORMAN LEONARD,
Attorneys for Respondents.

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondents herein; that he has read the foregoing Supplemental Answer and knows the contents thereof; that the same is true of his own knowledge, except

as to matters therein stated on information or belief; and as to those matters, that he believes it to be true.

/s/ NORMAN LEONARD.

Subscribed and sworn to before me this 13th day of September, 1948.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Admitted in evidence as General Counsel's Exhibit No. 1-G. September 15, 1948.]

[Title of Board and Cause.]

MOTION FOR LEAVE TO AMEND
COMPLAINT AND AMENDMENT

To the Honorable Irving Rogosin, Trial Examiner,
c/o Chief Trial Examiner, National Labor Relations Board, Washington, D. C.:

Comes now counsel for the General Counsel of the National Labor Relations Board and, pursuant to Section 203.17 of the Rules and Regulations of the National Labor Relations Board, moves the Trial Examiner for leave to further amend the Complaint issued in this matter on August 20, 1948, as amended September 3 and 21, 1948, by adding to the allegations contained therein the following paragraphs to appear following paragraphs VI and X of the

Complaint, as amended, to be numbered paragraphs VI (b) and (c) and X (b) and (c), respectively, as follows:

VI (b)

On or about December 1, 1948 WEA yielded to the demands and insistence of the ILWU in order to terminate the strike which had been in effect since September 2, 1948, as set forth in paragraph XI (b) of the Complaint as amended, and the members of the ILWU thereupon returned to work about December 6, 1948. Thereafter, about December 17, 1948, WEA executed an agreement with the ILWU, copy of which is attached hereto, which agreement contains provisions relating to the registration, hiring and dispatching of longshoremen, in substantially the same terms as demanded by the ILWU, as set forth in para. VI of the Complaint, as amended, and in addition provides that preference of employment shall be given to members of the ILWU. Since about December 6, 1948, the employment of longshoremen has been governed and controlled according to the terms of said agreement. The provisions of said agreement relating to the registration, hiring, dispatching of longshoremen are in practical operation and procedure discriminatory and illegal as set forth in paragraph VI of the Complaint, as amended. The provision granting preference of employment to members of the ILWU is illegal and discriminatory in practical operation and procedure, as well as under the terms of the Act.

VI (c)

Respondents by the conduct described above have restrained and coerced and are restraining and coercing employees of the companies, members of the WEA, in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and are engaging in unfair labor practices within the meaning of Section 8, subsection (b) (1) (A) of the Act, and caused and attempted to cause and are causing and attempting to cause WEA and/or its member companies to discriminate against employees in violation of Section 8, subsection (a) (3) of the Act, and did thereby engage in and are engaging in unfair labor practices within the meaning of Section 8, subsection (b) (2) of the Act.

X (b)

On or about December 1, 1948, WEA and/or Waterfront Employers Association of California and Waterfront Employers of Oregon and Columbia River yielded to the demands and insistence of the ILWU in order to terminate the strike which had been in effect since September 2, 1948, as set forth in paragraph XI (b) of the Complaint, as amended, and agreed with the ILWU, that the registration, hiring and dispatching of ships' clerks or checkers shall be governed and controlled according to the practices and procedures existing prior to June 15, 1948, as set forth in paragraph X of the Complaint, as amended, and in addition thereto agreed that preference of employment shall be given to members of the ILWU. The parties

further agreed that provisions relating to the above terms of employment shall be included in the final agreement to be executed between them. Since about December 6, 1948, the employment of ships' clerks or checkers has been governed and controlled as appears above and the strike terminated. Said provisions relating to the registration, hiring and dispatching of ships' clerks or checkers are in practical operation and procedure discriminating and illegal, as set forth in paragraph X of the Complaint, as amended. The provision granting preference of employment to members of the ILWU is illegal and discriminatory in practical operation and procedure, as well as under the terms of the Act.

X (c)

Respondents by the conduct described above have restrained and coerced and are restraining and coercing employees of the companies, members of the WEA, in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and are engaging in unfair labor practices within the meaning of Section 8, subsection (b) (1) (A) of the Act, and caused and attempted to cause and are causing attempting to cause WEA and/or its member companies to discriminate against employees in violation of Section 8, subsection (a) (3) of the Act, and did thereby engage in and are

engaging in unfair labor practices within the meaning of Section 8, subsection (b) (2) of the Act.

Respectfully submitted,

/s/ REEVES R. HILTON,

Counsel for the General Counsel for the National Labor Relations Board.

Dated February 9, 1949.

[Admitted in evidence as General Counsel's Exhibit No. 1-P. April 19, 1949.]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO COMPLAINT

Come now the respondents herein and file this, their Answer to the Amendment to the Complaint dated February 9, 1949, and allowed by the trial examiner on March 9, 1949, and in support thereof allege as follows:

I.

Incorporate by reference all of the answers heretofore filed by the respondents on September 1, 1948, marked Exhibit 1-d herein, on September 15, 1948, marked Exhibit 1-g herein, and on September 28, 1948, marked Exhibit 1-j herein.

II.

Answering the allegations of paragraphs VI(b) of the said Amendment, respondents deny each and every, all and singular, generally and specifically the allegations of said paragraph and demand strict proof thereof.

III.

Answering the allegations of paragraph VI(c) of the said Amendment, respondents deny each and every, all and singular, generally and specifically the allegations of said paragraph and demand strict proof thereof.

IV.

Answering the allegations of paragraph X(b) of the said Amendment, respondents deny each and every, all and singular, generally and specifically the allegations of said paragraph and demand strict proof thereof.

V.

Answering the allegations of paragraph X(c) of the said Amendment, respondents deny each and every, all and singular, generally and specifically the allegations of said paragraph and demand strict proof thereof.

As and for a Separate, Further and Affirmative Defense and Specifically in Answer to the Allegations of Paragraphs VI(b) and X(b), of Said Amendment, Respondents Allege:

I.

That on or about December 1, 1948, collective bargaining contracts were entered into by and between Pacific American Shipowners Association and American Radio Association, CIO, and by and between Pacific American Shipowners Association and Pacific Coast Marine Firemen, Oilers, Water-tenders and Wipers Association. That the said collective bargaining contracts contain substantially the same provisions with respect to hiring practices

and procedures, registration practices and procedures, preference of employment and other similar matters as are described in paragraphs VI(b) and X(b) of the said amendment to the complaint. That the National Labor Relations Board and its General Counsel and their agents, officers and attorneys are aware of the execution and existence of the aforesaid collective bargaining contracts. That it is a denial of due process of law and of the equal protection of the laws to respondents for the National Labor Relations Board, its General Counsel, and their agents, officers and attorneys wilfully and deliberately to proceed against the alleged contracts of respondents herein while they wilfully and deliberately fail and neglect to proceed against the aforesaid contracts with full knowledge of the execution and existence thereof. That by proceeding herein under the circumstances hereinabove stated, the National Labor Relations Board, its General Counsel, their agents, officers and attorneys, are depriving respondents and each of them of due process of law and of the equal protection of the laws guaranteed to them by the Fifth Amendment to the Constitution of the United States.

II.

That the said Amendment is not based upon any charge, nor upon any charge which was served upon any of the respondents prior to the issuance of the said Amendment, contrary to the provisions of §10(b) of the said Act.

Wherefore, respondents pray that the said complaint, together with its amendment and its sup-

plemental amendment and its amendment be dismissed and for such other and further relief as to the National Labor Relations Board may seem just and proper in the premises.

Dated March 14, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By NORMAN LEONARD,
Attorneys for Respondents.

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for respondents in the within action and makes this verification for and on their behalf; that he has read the foregoing Answer to Amendment to Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to such matters he believes it to be true.

NORMAN LEONARD.

Subscribed and sworn to before me this 14th day of March, 1949.

[Seal] AGNES QUAVE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires January 14, 1953.

[Admitted in evidence as General Counsel's Exhibit No. 1-U. April 19, 1949.]

United States of America Before the National
Labor Relations Board

Case No. 20-CB-19

In the Matter of

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, Affiliated
with the CONGRESS OF INDUSTRIAL
ORGANIZATIONS

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST¹

Case No. 20-CB-38

In the Matter of

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34 and LOCAL 34;
MARINE CLERKS ASSOCIATION, LOCAL
1-63, and SUPERCARGOES AND CHECK-
ERS UNION, LOCAL 40, Each Affiliated with
INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION, C. I. O.

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

¹It appears that, after the hearing in the instant proceeding, the Employers, Waterfront Employers Association of the Pacific Coast, merged or consoli-

DECISION AND ORDER

On November 30, 1949, Trial Examiner Irving Rogosin issued his Intermediate Report in this proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. He also found that the Respondents had not engaged in certain other unfair labor practices, and recommended dismissal as to them. Thereafter, the Respondents and the General Counsel filed exceptions, and the Respondents filed a supporting brief. In addition, the Respondents have requested oral argument. This request is denied as the record and brief, in our opinion, adequately present the issues and positions of the parties.²

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.³ The

dated with Pacific American Shipowners Association to form a new organization, the Pacific Maritime Association. See Pacific Maritime Association, 89 NLRB No. 115.

²On January 10, 1950, the Respondents moved to reopen the record principally to bring "the collective bargaining history up to date." For the reasons set forth *infra*, the motion is hereby denied.

³The Respondents except, *inter alia*, to the Trial Examiner's denial of the Employers' request of March 29, 1949, for the dismissal of the present cases. Like the Trial Examiner, we are of the opin-

Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions, modifications, and exceptions:

1. The Trial Examiner found, and we agree, that the Respondents violated Section 8 (b) (2) of the Act.

We find it necessary to rely in this connection only on the facts that: (1) The Respondents entered into the coast longshore agreement, dated December 6, 1948, and related contracts⁴ with the Employers containing separate provisions specifi-

ion that the policies of the Act would best be effectuated by a determination of the issues raised herein. Accordingly, we hereby affirm the Trial Examiner's ruling. See *Chicopee Manufacturing Corporation of Georgia*, 85 NLRB No. 226, and *Wine, Liquor & Distillery Workers Union*, 78 NLRB 504, *enfd.* 178 F. 2d 584 (C. A. 2). The Respondents further contend that there was no adequate compliance with Section 10 (b) and that the Board in effect lacks jurisdiction in the instant proceeding. We find no merit in these contentions. The record discloses that copies of the charges were served upon the Respondents with the complaint and we are of the opinion, as concluded by the Trial Examiner, that no jurisdictional defect exists. See *Cathey Lumber Co.*, 86 NLRB No. 30, and *N. L. R. B. v. Itasca Cotton Manufacturing Company*, 179 F. 2d 504 (C. A. 5), *enfg.* 79 NLRB 1442.

⁴Similar contracts concerning the ship clerks and checkers were entered into on January 17, March 11, and March 25, 1949.

cally according preference in employment to members of the Respondents;⁵ and (2) since December 6, 1948, as appears from the stipulation of the parties, the Respondents have participated in the actual enforcement of these provisions, as a result of which members of the Respondents have been given preference in employment over nonmembers.⁶

By thus entering into contracts discriminatorily granting preference in employment to their members, and by actively participating in the enforcement of these provisions, it is clear, and we find, that the Respondents caused the Employers to discriminate against nonmember employees in violation of Section 8 (a) (3) of the Act, thereby violating Section 8 (b) (2).⁷

⁵The separate provision in the coast longshore agreement reads in pertinent part as follows:

Preference of employment shall be given to members of the [ILWU] whenever applicable
* * * both in making additions to the registration list and in dispatching men to jobs.

⁶In its motion to reopen the record, the Respondents did not allege that the parties had in any manner ceased to give effect to the preference provisions.

⁷See *National Maritime Union of America*, 78 NLRB 871, enfd. 175 F. 2d 686 (C.A.2), cert. den. 338 U. S. 954. *American Radio Association*, 82 NLRB 1344; *National Maritime Union of America*, 82 NLRB 1365.

For the reasons set forth in his separate opinion attached hereto, Member Reynolds does not join in the majority decision not to pass upon the legality of the other hiring provisions. His position is

2. Unlike the Trial Examiner, however, we do not find that the Respondents, on and after August 30, 1948, threatened to, or engaged in, strike action to obtain unlawful hiring provisions, or insisted upon such provisions as a condition precedent to any collective bargaining agreement, in contravention of Section 8 (b) (2) and 8 (b) (3) of the Act.

The record clearly shows that on August 28, 1948, when the parties exchanged memoranda on their respective positions, the Respondents, while proposing a continuation of the hiring hall and dispatching procedures, omitted any request for membership preference and proposed instead that preference be granted to registered men, adding: "In making additions to or deletions from the registered list, there shall be no discrimination because of union membership or activities * * *". At the same time, the Employers offered "to continue the present provisions of the contract concerning dispatching halls and preference of employment provisions, subject to the stipulation that, in the event of a legally binding decision of any court on this issue, the whole subject shall be sub-

similar to that considered and fully answered by a majority of the Board in Chicago Newspaper Publishers Association, 86 NLRB No. 116. As the majority held in that case, we are here performing the same sort of function as that performed by a court and we shall adhere to the sound judicial principle that "it is never desirable for a court to go beyond what a decision demands" in disposing of a particular case. *Douds v. Local No. 1250, et al.*, 173 F. 2d 764 (C. A. 2).

ject to renegotiation at the request of either party.”

Thereafter, on August 30 and 31, the Respondents in effect acceded to the Employers' proposal of August 28 with respect to the hiring provisions, differing with the Employers only by requesting that the savings clause be contained in a covering letter, rather than in the contract itself. Although the parties failed to agree on the location of the savings clause before the strike on September 2, it is patent that substantial agreement had been reached on the hiring provisions, and that the subsequent conflict between the parties related not to the hiring provisions, but to the Respondents' economic demands. Certainly, as observed by the Trial Examiner, it would be “unrealistic” to conclude that the Respondents would have engaged in a strike upon the narrow aspect of the location of the savings clause.⁸ And, significantly, the contracts agreed to by the Respondents and the Employers in December, 1948, and thereafter, included such savings clauses as addenda to the contracts, substantially as requested by the Employers prior to the strike.

Under the circumstances, therefore, we find, contrary to the conclusion of the Trial Examiner, that the Respondents on and after August 30, 1948, did not threaten to or engage in strike action to secure

⁸Contrary to the contentions of the General Counsel, we find, as did the Trial Examiner, that the picketing of Army facilities during the strike is not dispositive as to the objects of the strike called by the Respondents against the Employers.

unlawful hiring provisions, nor did the Respondents demand the inclusion of such provisions as a condition precedent to any collective bargaining agreement. Accordingly, we shall dismiss the complaint insofar as it alleges such conduct as violative of Sections 8 (b) (2) and 8 (b) (3).⁹

3. In the absence of exceptions to the Trial Examiner's findings that the Respondents did not violate Section 8 (b) (1) (A) of the Act, we shall dismiss that allegation in the complaint.

The Remedy

The Trial Examiner found that certain provisions of the contracts involved herein, were intrinsically, or in practice, violative of the Act and recommended in this regard that the Respondents cease giving effect to the proscribed provisions. In the absence of exceptions to the scope of such remedy,¹⁰ we shall similarly order that the Respondents cease and desist from giving effect to the contract provisions found unlawful herein, namely, those granting preference in employment to members of the Respondents, and from in any like or related manner causing or attempting to cause the Employers to discrimi-

⁹Cf. *National Maritime Union of America*, 78 NLRB 971, enfd. 175 F. 2d 686 (C. A. 2), cert. den. 338 U. S. 954; and *Santa Ana Lumber Company*, 37 NLRB No. 135.

¹⁰Cf. *Pacific Maritime Association*, *supra*, where exceptions had been filed to the limited order with respect to the contract.

nate against employees in violation of Section 8(a) (3) of the Act.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, each affiliated with International Longshoremen's and Warehousemen's Union, C. I. O., their officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving effect to those provisions of the collective bargaining contracts between the Respondents and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, and their respective members or successors, which grant preference in employment to members of any of the Respondents;

(b) In any like or related manner causing or attempting to cause the Employers to discriminate

against employees in violation of Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places copies of the notice attached hereto, marked Appendix A,¹¹ at all places where notices to members are customarily posted. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondents' representatives, be posted by the Respondents immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by them to insure that said notices are not altered, defaced, or covered by any other material;

(b) Furnish the Regional Director for the Twentieth Region signed copies of the form of notice attached hereto as Appendix A, for posting, with the consent of the Employers, on bulletin boards at their offices, and in all other places where notices are customarily posted by said Employers. The notices shall be posted for a period of sixty (60) consecutive days thereafter. Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed

¹¹In the event that this Order is enforced by decree of a United States Court of Appeals there shall be inserted before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

as provided in paragraph 2 (a) hereof, be forthwith returned to the Regional Director for said posting;

(c) Notify the Regional Director for the Twentieth Region, in writing with ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

It Is Further Ordered that the complaint, insofar as it alleges that the Respondents, or any of them, have otherwise violated the Act, and it is hereby is, dismissed.

Signed at Washington, D. C., this 20 day of July, 1950.

JOHN M. HOUSTON,
Member.

ABE MURDOCK,
Member,

PAUL L. STYLES,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

James J. Reynolds, Jr., Member, concurring specially:

I concur in all the specific findings of the majority opinion including the findings that the Respondents violated Section 8 (b) (2) of the Act by entering into the coast longshore agreement with the Employers containing separate provisions spe-

cifically according preference in employment to members of the Respondent, and by enforcing such provisions. However, for substantially the same reasons stated in my concurring opinion in the Chicago Typographical Union¹² case, I cannot concur in the failure of the Board to pass upon allegations in the complaint, and the findings of the Trial Examiner made thereon, that the Respondents violated Section 8 (b) (2) of the Act by executing and giving effect to other hiring hall provisions in the agreement. As pointed out in that opinion, this Board not only has the power to resolve issues arising from such allegations but it is perhaps the only forum for their presentation.

The complaint alleged that the Respondents violated Section 8 (b) (2) of the Act by executing and giving effect to agreement provisions covering (1) the operation of the joint hiring hall, (2) the selection of dispatchers, (3) the dispatching of employees, and (4) the registration of maritime workers, as well as by executing and giving effect to the preferential hiring provisions. The Board is passing upon the legality of only the last allegation. Yet as the Trial Examiner stated, it is clear that the Respondents do not seriously dispute that the provisions for preference of employment by reason of union membership are clearly proscribed by the Act. And, as we state in the majority opinion herein, the Respondents on August 28, 1948, while

¹²Chicago Typographical Union No. 16 and International Typographical Union (Chicago Newspaper Publishers Association), 86 NLRB No. 116.

proposing a continuation of the hiring hall and dispatching procedures, omitted any request for membership preference and proposed instead that preference be granted to registered men. It is therefore apparent that the only issues joined and seriously litigated related to the legality of those aspects of the jointly operated hiring hall which the majority is bypassing. The Respondents are thus ordered to forego a contract clause, the illegality of which is acknowledged while at the same time they remain uninformed with respect to the legality of contract clauses which they vigorously maintain the Act permits, contrary to the contentions of the General Counsel. I cannot subscribe to such an abdication by the Board of its responsibility to the public by leaving problems unsettled which are fraught with possibilities of industrial strife.

Signed at Washington, D. C., this 20 day of July, 1950.

JAMES J. REYNOLDS, JR.,
Member,

NATIONAL LABOR
RELATIONS BOARD.

Appendix A

Notice to All Officers, Representatives, Agents, and Members of International Longshoremen's and Warehousemen's Union: International Longshoremen's and Warehousemen's Union District No. 1; Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63 and Supercargoes and Checkers Union, Local 40, Each Affiliated with International Longshoremen's and Warehousemen's Union, Affiliated with the Congress of Industrial Organizations

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not give effect to those provisions of the collective bargaining contracts between the above unions and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, and the other Regional Associations, the said Regional Associations, and their respective members, which grant preference of employment to members in the said unions or any of them.

We Will Not in any like or related manner cause, or attempt to cause, the Employers or their suc-

cessors, to discriminate against employees in violation of Section 8 (a) (3) of the Act.

Dated.....

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, CIO

By,
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1

By,
(Representative) (Title)

SHIP CLERKS ASSOCIATION,
LOCAL 34,

By,
(Representative) (Title)

MARINE CLERKS
ASSOCIATION, LOCAL 1-63,

By,
(Representative) (Title)

SUPERCARGOES AND CHECKERS UNION,
LOCAL 40,

By,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This complaint, issued on August 20, 1948, by the Regional Director for the Twentieth Region (San Francisco, California), on behalf of the General Counsel of the National Labor Relations Board, is based upon separate amended and "additional" charges, consolidated for the purpose of hearing, duly filed by the Waterfront Employers Association of the Pacific Coast, herein variously called the WEA, the Association, or the Employers, against the Unions named in the above caption, herein jointly and severally called the ILWU, the Union, or the Respondents, as the context may require, alleging the commission of unfair labor practices within the meaning of Section 8 (b) (1) (A), (2), and (3), and Section 2 (6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 161, herein called the Act.¹ Copies of the complaint, order

¹It was suggested, prior to the final closing of the hearing, that a merger was contemplated of the WEA, the Waterfront Employers Association of California, mentioned later, and the Pacific American Shipowners Association, involved in a companion case against the National Union of Marine Cooks and Stewards, CIO (Case No. 20-CB-20), into a single employer association, to be known as Pacific Maritime Association, which would act as collective bargaining representative in the place

consolidating the cases, and notice of consolidated hearing thereon were duly served on the Respondents and the WEA; a copy of the first amended charge in Case No. 20-CB-19 was served on the ILWU, the principal Respondent, as distinguished from the local unions, on August 24, 1948.

Specifically, the complaint, as amended both during and after the original hearing, alleged, in substance, that:

(1) since December, 1946, the Respondent ILWU, and various dispatchers under its control, have failed and refused, although requested, to dispatch one, True Knowledge, a duly registered longshoreman, from the hiring hall maintained and operated jointly by the ILWU and the WEA at the

and stead of these associations. Since no official notice has been received of the consummation of the proposed merger, the Association will be referred to by its original name. References to the General Counsel, unless otherwise stated, or required by the context, are to his representatives at the hearing; similarly, references to the Board, are to the National Labor Relations Board. Case No. 20-CB-19 deals with the unit of longshore employees; Case No. 20-CB-38, with the units of ship clerks and checkers. The scope of these units and the status of both the employer and employee representatives in these units will be developed later. The "additional" charges mentioned above refer to separate charges filed by the WEA, on behalf of the regional associations hereinafter described, against the several ILWU locals, respectively, involving the units of ship clerks and checkers.

port of San Francisco, because he was not a member of the ILWU;²

(2) since about February 21, 1948, in collective bargaining negotiations with the WEA, the ILWU, as exclusive representatives of longshore employees of member companies of WEA, has demanded and insisted upon stated contract provisions requiring the hiring of all longshoremen through halls, maintained and operated jointly by the ILWU and various employer associations, under the supervision of a union dispatcher;

(3) since about April 13, 1948, in similar negotiations, the ILWU, and its several named locals, exclusive representatives in collective bargaining with respective employer associations, whose members employ ship clerks and checkers in stated regional areas, have demanded and insisted upon provisions similar to those sought with respect to longshoremen;

(4) the Respondents' demand for and insistence upon such provisions were illegal and discriminatory in practical application for stated reasons;

(5) because of the refusal of the WEA, and the various regional associations involved to accede to

²Presumably because the alleged act of discrimination occurred more than 6 months before the issuance of the complaint, the General Counsel sought no redress on behalf of True Knowledge. The allegation was made, and the evidence concerning it was offered and received, solely as an example of the manner in which the hiring hall was conducted in actual practice.

the Respondents' demands, and in order to compel them to yield thereto, the Respondents, in about April and May, 1948, directed, induced, and encouraged the employees of members of said Associations to engage in a strike against said members on and after June 15, 1948, the expiration date of existing collective bargaining agreements;

(6) although the said strike action was enjoined in the District Court of the United States for the Northern District of California, on July 2, 1948, when the preliminary injunction was dissolved, on September 2, 1948, the Respondents engaged in, and ordered members of the Respondent Unions, employed by members of the Associations, to engage in a strike for the purpose of compelling said Associations to execute contracts, which, expressly, or in their performance, discriminated against employees;

(7) on or about December 1, 1948, the WEA, in order to terminate the strike, yielded to the ILWU's demands, with respect to the longshoremen and ship clerks and checkers, whereupon, on about December 6, 1948, the ILWU members returned to work;

(8) on or about December 17, 1948, the WEA and the ILWU executed a collective bargaining agreement embodying the provisions for hiring, dispatching, and registration, and preference of employment for ILWU longshoremen which the Respondents had originally demanded;

(9) on or about December 1, 1948, in order to

terminate the strike, the WEA and/or the regional associations involved, similarly yielded to the demands of the ILWU, and agreed that hiring, dispatching, and registration of ship clerks and checkers should be governed by the practices prevailing prior to June 15, 1948, and further agreed to embody such provisions in any final agreement between the parties;³

(10) since about December 6, 1948, when the strike was terminated and the ship clerks and checkers returned to work, the employment of these persons has been governed by and controlled in accordance with said agreement;

(11) the provisions relating to hiring, dispatching, and registration, and preference of employment to ILWU members, with respect to longshoremen and ship clerks and checkers, are in practical operation and application, as well as under the provisions of the Act, discriminatory and illegal; and

(12) by all the foregoing conduct, the Respondents have:

³As will later appear, the master agreement covering ship clerks and checkers was not actually executed until January 17, 1949; supplementary agreements, designated as port supplements, were executed on March 11, 1949, with respect to the Los Angeles-Long Beach Harbor area, and, on March 25, 1949, with respect to the Oregon and Columbia River area. As of the final close of the hearing on April 21, 1949, no port supplement had been executed for the San Francisco Bay area.

(a) attempted to cause, are attempting to cause, and have caused the WEA and/or its member companies to discriminate against employees in violation of Section 8 (a) (3) of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (b) (2);

(b) refused to bargain collectively with the said WEA and the regional associations, in violation of Section 8 (b) (3); and

(c) restrained and coerced, and are restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (b) (1) (A) of the Act.⁴

Pursuant to notice, a hearing was held in San Francisco, California, on various dates between September 1, 1948, and April 21, 1949, both inclusive,⁵ before Irving Rogosin, the undersigned

⁴In reciting the substance of the allegations, an attempt has been made to state them in substantial chronological sequence rather than in the order in which they appear in the complaint or the amendments. The allegations intended to be embraced in (4) were added by amendment during the hearing on September 3rd; those in (1) and (6), on September 20, 1948. Allegations (7), (8), (9), (10), and (11), were added by amendment, after a motion by the General Counsel, filed February 9, 1949, for leave to reopen the record, amend the complaint, and adduce additional evidence relating to events which occurred after the hearing closed initially on October 28, 1948.

⁵After the hearing was originally closed on October 28, 1948, the record was reopened on motion of

Trial Examiner duly designated by the Acting Chief Trial Examiner, All parties were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. At the outset of the hearing, counsel for the Respondents moved, orally and in writing, to dismiss the complaint on the grounds that (1) the complaint failed to establish a violation of any provision of the Act, or that the Respondents had committed any unfair labor practices thereunder; (2) the first amended charge upon which the complaint was based had not been served upon the Respondents prior to the issuance thereof, contrary to the provisions of Section 10 (b) of the Act; (3) the Act, inherently, and as construed and applied, was repugnant to the First, Fifth, and Thirteenth Amendments to the Constitution; and (4) the provisions of the Act involved, as construed and applied, denied the Respondents equal protection of the laws, in that said provisions were being discriminatorily applied to the Respondents, without being similarly enforced against other labor organizations allegedly engaging in the same practices.

With respect to the constitutional grounds assigned, the undersigned, adhering to the principle enunciated by the Board that, as an administrative agency, it would assume the constitutionality of the legislation it was appointed to administer until

the General Counsel, and the hearing reconvened on April 20, 1949.

otherwise determined by the courts,⁶ declined to pass upon those grounds. As to the contention that service of the charge or amended charge "upon which the complaint is based," prior to the issuance of the complaint, is an indispensable jurisdictional requirement, the contention was rejected.⁷

⁶Matter of Rite-Form Corset Company, 75 N.L.R.B. 174; Matter of National Maritime Union of America, et al., 78 N.L.R.B. 971, 979.

⁷Section 10 (b) of the Act, on which the Respondents rely, reads:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. * * *"

Although the General Counsel asserts that, in actual regional office practice, the charge or amended charge on which the complaint is based is usually attached to the complaint, when served with the notice of hearing, the affidavits of service in these cases do not indicate that the practice was followed here. In Case No. 20-CB-19, the affidavit discloses service of a copy of the first amended charge on August 24, 1948, 4 days after the issuance of the original complaint, on International Longshoremen's and Warehousemen's Union, C.I.O. Affidavit of service in the consolidated cases reveals service

It may be noted, in passing, that the contention that the Act is being discriminatorily enforced against the Respondents, in that proceedings have not been instituted against other labor organizations allegedly engaging in similar practices is without merit. Such fact, even if established, would afford the Respondents no immunity from its own unlawful conduct, nor constitute a basis for a claim of denial of equal protection of the laws. The motion to dismiss having been denied, the Respondents moved, orally and in writing, to strike certain allegations of the complaint, in effect, on the ground that they failed to establish that the Respondents had committed unfair labor practices within the meaning of the Act; that certain of the acts com-

on August 20, 1948, the date of the complaint, of "Complaint and Order Consolidating Cases and Notice of Consolidated Hearing," on the Respondents I.L.W.U. and the several locals named in the complaint. The Respondents contend that Section 10 (b), particularly the proviso, requires the filing and service of the charge as a jurisdictional prerequisite to the issuance of complaints in all cases, irrespective of when the unfair labor practices are alleged to have occurred. Although a literal interpretation of the proviso might lead to such a conclusion, it is apparent from an examination of the entire section, as well as the legislative history, that the proviso was intended as in the nature of a statute of limitations designed to prevent the issuance of complaints based upon stale claims, rather than as a jurisdictional requirement. Here, the earliest date on which unfair labor practices are alleged to have occurred is February 21, 1948. The original charge in Case No. 20-CB-19 was filed on June 10, 1948; the amended charge in Case No. 20-CB-38, on

plained of did not constitute unfair labor practices within the meaning of Section 8 (b) (1) (A); and that, with respect to other allegations, they failed to state that the acts complained of affected commerce within the meaning of the Act. The General Counsel having stated for the record that the latter omission was due to inadvertence, he was permitted to amend the complaint accordingly, and the Respondents' motion to strike was denied.

The Respondents thereupon filed their answer, denying generally the substantive allegations of the complaint, as amended; specifically denying the appropriateness of the unit of ship clerks and checkers alleged in the complaint, and affirmatively alleging as appropriate the unit described in the

August 20, 1948. The unfair labor practices are alleged to have continued until the final close of the hearing. The original complaint, setting forth with far greater specificity than is usual in a charge, the nature of the alleged unfair labor practices, was itself served within 6 months of the occurrence of the earliest unfair labor practices. If timely notice of the nature of alleged unfair labor practices is an objective of the proviso, certainly this function has been fulfilled by the actual service of the complaint within the time required. In view of all the circumstances, the undersigned has concluded that the fundamental purpose of Section 10 (b) has been satisfied, and that the Respondents' contention is without merit. The contention that this section also requires the filing and service of amended charges prior to the issuance of the amendments to the complaint is found equally, without merit, especially in view of the nature of the amendments. Cf. *Matter of Cathey Lumber Co.*, 86 N.L.R.B., No. 30; *Matter of J. H. Rutter-Rex Manufacturing Co., Inc.*, 86 N.L.R.B., No. 68.

Board's Decision, Direction of Election, and Order, reported at 71 N. L. R. B. 121. Further answering, the Respondents reiterated the constitutional grounds of defense urged in their motion to dismiss. The allegations concerning Respondents' status as labor organizations within the meaning of the Act; the appropriateness of the unit of longshoremen; the status of the ILWU as majority representative of the employees in said unit, were unanswered, and, in accordance with the Board's Rules and Regulations, are deemed to have been admitted.⁸

When, on September 3, 1948, the General Counsel moved to further amend the complaint,⁹ counsel for the Respondents, though not objecting to the amendment, demanded the "statutory notice" of 10 days before continuing with the hearing, contending that the proposed amendment constituted, in effect, a new cause of action. The request was denied, and the amendment allowed, with the understanding that if, at the conclusion of the General Counsel's case, the Respondents required additional time within which to meet issues newly raised, they might so move. Permission was also granted the Respondents to file such further responsive pleadings as they deemed necessary before the close of the hearing or within such additional time as might be granted. No request or application

⁸Rules and Regulations, Series 5, as amended August 18, 1948, Sec. 203.20.

⁹See footnote 4.

for further time to prepare to meet issues newly raised was thereafter made.¹⁰

Motion by the Respondents for a 10-day adjournment or, alternatively, for 5 days within which to answer the allegations in a further motion to amend the complaint, granted on September 20, 1948,¹¹ was denied, on condition that the General Counsel defer the introduction of evidence bearing on the issues raised by the amendment until the conclusion of the rest of his evidence, at which time Respondents might renew the motion if they desired. The motion was not thereafter renewed. Leave was granted the Respondents to file such additional pleadings in response to the amendment as they might require.

In response to each of the various motions to amend the complaint, granted over the Respondents' objection during the course of the hearing, the

¹⁰At the close of the session on Friday, September 3, 1948, the hearing was adjourned over Labor Day to Tuesday, September 7th. Shortly after the hearing reconvened, counsel for the General Counsel moved for an adjournment until Wednesday, September 15th, to afford him an opportunity to confer with W.E.A. officials, as well as the General Counsel in Washington. All parties consenting, the motion was granted. Counsel for the Respondents thereupon agreed that he would not pursue his demand for 10 days' notice because of the amendment, or later urge, as a ground of denial of due process, that he had not been granted the time requested, but reserved the right to request additional time to prepare to meet the issues newly raised if he deemed it necessary.

¹¹See footnote 4.

Respondents filed supplemental motions to dismiss, on substantially the same grounds as those urged in their original motion to dismiss the complaint. The motions were denied, or reserved for later ruling. In their supplemental answers to the several amendments, the Respondents denied generally the allegations in the amendments; affirmatively alleged that, since on or about September 2, 1948, and continuously thereafter, including on or about September 10, 1948, the WEA had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (5), and 8 (a) (1), by failing and refusing, although requested, to bargain collectively with the Respondents or any of them, thereby restraining and coercing the employees in the exercise of the rights guaranteed in Section 7 of the Act; and prayed that the complaint and the amendment thereto be dismissed. A motion to dismiss on similar grounds, made during the course of the hearing, was similarly denied.

At the close of the General Counsel's case, the Respondents' motions, on which ruling had been reserved, were denied. The Respondents thereupon moved to dismiss the entire proceeding upon the merits, on all of the grounds previously urged, including the WEA's alleged refusal to bargain, and the additional ground that, with respect to the allegations concerning True Knowledge, the alleged discrimination had occurred at a time when preference of employment to union members, provided for in the existing contract, had been permitted under the law then in effect. The motion to dismiss was de-

nied, with leave to renew at the close of the hearing.¹² Counsel for the Respondents thereupon moved for an adjournment of 2 weeks in order to prepare his defense to the complaint, as amended during the course of the hearing, and to meet the evidence adduced, as well as to prepare for the trial of a companion case involving substantially similar issues as those here involved.¹³ With the consent of all parties, the hearing was adjourned to October 13, and later, at the request of the Respondents, to October 25, when the hearing was reconvened.

On October 26, the Respondents moved, without objection, to amend their original answer to allege

¹²On about October 7, 1948, while the hearing was in recess, the Respondents filed with the Board a request for special permission to appeal directly from the undersigned's ruling denying their motion to dismiss at the close of General Counsel's case. Opposition to the request was filed by the General Counsel on October 14th. By telegraphic order on October 18th, the Board denied the request, stating that it preferred to consider the motion upon the record as a whole after completion of the hearing and issuance of the Intermediate Report.

¹³Matter of National Union of Marine Cooks and Stewards, and Pacific American Shipowners Association, Case No. 20-CB-20, which had originally been scheduled for hearing on September 9, 1948, and had been postponed until the completion of the hearing in the instant case. Counsel appearing for the Respondents herein also represent the Respondents in that case. The General Counsel stating for the record that certain amendments to the complaint would be required in that case, preparation of which would necessitate additional time, concurred in the request for the continuance in the instant case.

that the unit of ship clerks, alleged in the complaint to be appropriate, included no persons who are supervisors within the meaning of Section 2 (11) of the Act. At the close of the evidence, the Respondents renewed their motion to dismiss the proceedings, as well as all their motions previously made, on the grounds asserted. Ruling thereon was reserved. The motions are disposed of by the findings and conclusions hereinafter made. Motion of the General Counsel to conform the pleadings to the proof, with respect to formal matters not affecting the substantive issues, was granted without objection. At the close of the evidence, all parties availed themselves of the opportunity to argue orally on the record, and were apprised of their right to file briefs and proposed findings of fact and conclusions of law with the undersigned.

As has already been suggested, on February 9, 1949, the General Counsel moved for leave to reopen the record for the purpose of introducing a further motion to amend the complaint, and adducing additional evidence of events which had occurred since the original close of the hearing on October 28, 1948. Specifically, the allegations related to the negotiation, execution, performance, and operation of certain collective bargaining agreements covering longshoremen and ship clerks and checkers.¹⁴ On February 16, 1949, the undersigned issued an order to show cause, on or before March 1, 1949, why the motion for leave to reopen the record should not

¹⁴For the allegations in the amendment, see footnote 4.

be granted, and the hearing reopened for the purposes stated in the motion. On March 7, the Respondents filed their opposition to the motion for leave to amend the complaint,¹⁵ on the ground that the complaint had already been amended twice, each time shifting the theory of the General Counsel's case; that no new charge had been filed as a basis for the amendment; and that, although the Rules and Regulations permitted the allowance of such amendment, "better practice" required that a new complaint, based upon a charge, be issued. On March 9, the undersigned issued an order (1) allowing the motion for leave to reopen the record for the purposes stated therein, and reopening the record; (2) granting the motion to amend; (3) allowing the Respondents 10 days within which to file an answer to the amendment; and (4) reconvening the hearing on March 23, 1949. The date for the resumption of the hearing was later postponed to April 20, 1949.

In their supplemental motion to dismiss the amendment to the complaint, the Respondents incorporated by reference the grounds urged in their earlier motions and in the opposition to the motion to amend, and moved that the entire complaint, as amended, be dismissed. The motion was denied with leave to renew before the close of the hearing.

The Respondents' answer to the amendment in-

¹⁵Upon the reopening of the hearing, at the request of counsel for the Respondents, the opposition to the amendment of the complaint was treated as opposition to the reopening of the hearing as well.

incorporated by reference all the answers previously filed, denied generally the allegations contained, and affirmatively averred that the Respondents had been denied due process and equal protection of the laws. As grounds for this latter defense, the Respondents alleged that, notwithstanding that another employer association had, on or about December 1, 1948, with the knowledge of the Board and the General Counsel, entered into collective bargaining agreements with two other labor organizations, containing substantially the same hiring hall, preference of employment, and related provisions as those now charged, no similar unfair labor practice proceeding had been instituted against the "aforesaid contracts."

On March 29, 1949, the WEA, by its attorneys, filed a document entitled Request for Dismissal, asking that the consolidated proceeding be dismissed "without prejudice." When the hearing reconvened on April 20, 1949, counsel for the Respondents moved that the proceedings be dismissed, on the basis of the WEA's request,¹⁶ on the ground, in substance, that, since the close of the original hearing, the parties had negotiated collective bargaining agreements under which they had been operating successfully, and that to pursue these proceedings would unsettle the harmonious

¹⁶In clarification, W.E.A. counsel stated at the hearing that no special significance was to be attached to the phrase, "without prejudice," and that it was the sense of the request that the proceedings be dismissed unconditionally.

industrial relations which had been attained, to the detriment of the industry and the public. For his part, in seconding this motion, counsel for the WEA argued that, inasmuch as Congressional action, designed to remove hiring halls from the proscription of the Act, was reasonably to be anticipated, the issues would become moot, and no useful purpose would be served by continuing the proceedings. Opposing the request, counsel for the General Counsel pointed out that the collective bargaining agreements, which preserved the existing hiring hall practices, had been the result of economic duress by the ILWU, and that to dismiss these proceedings would be to condone otherwise unlawful conduct. With respect to possible Congressional action, counsel for the General Counsel observed that prospect of such action was too speculative to be a relevant consideration. After carefully weighing all the considerations, the arguments of counsel, and the public policy which the Act was designed to effectuate, the request to dismiss the proceedings, for leave to withdraw the charges and the motion to dismiss the complaint, as amended, were denied, with leave to renew before the close of the hearing. When renewed, ruling on the motions was reserved. The motions are disposed of by the findings and conclusions herein. Before the final closing of the hearing, all parties were reminded of their right to file briefs, and proposed findings of fact and conclusions of law. After a number of extensions of time for filing briefs, the General Counsel and the Respondents filed their briefs on

May 24, 1949, and June 13, 1949, respectively. None of the parties has filed proposed findings of fact or conclusions of law.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of the Companies

Waterfront Employers Association of the Pacific Coast, herein called the WEA, the Association, or the Employers, as the context may require, is an employer association, organized since June 22, 1937, under the laws of the State of California as a non-profit corporation, designated by the shipping, shipping company agents, stevedore, and terminal companies whose names appear in Appendix A, as their agent for the purposes of bargaining collectively with labor organizations concerning rates of pay, wages, hours of employment, and other conditions of employment of employees of said companies engaged in performing longshore work, as hereinafter defined, on the Pacific Coast.

Waterfront Employers Association of California, herein called the WEAC, is an employer association, organized since November 1, 1943, under the laws of the State of California as a non-profit corporation, acting in concert with, and administering the policies of, the WEA, in the State of California, designated by the companies whose names appear in Appendix A, as their agent for the purposes of

bargaining collectively with labor organizations concerning rates of pay, wages, hours of employment, and other conditions of employment of employees of said companies engaged in performing clerical work in connection with the loading and discharging of ships cargo, as hereinafter defined, in the San Francisco Bay, and Los Angeles-Long Beach Harbor areas.

Waterfront Employers of Oregon and the Columbia River, herein called the WEOC (formerly known as Waterfront Employers of Portland, herein called the WEP),¹⁷ is an employer association, organized since December 12, 1934, under the laws of the State of Oregon as a non-profit corporation, acting in concert with, and administering the policies of, the WEA, in the State of Oregon, designated by the companies whose names appear in Appendix A, as their agent for the purposes of bargaining collectively with labor organizations concerning rates of pay, wages, hours of employment, and other conditions of employment of employees of said companies engaged in performing clerical work in connection with the loading and discharging of ship's cargo, as hereinafter defined, in the Oregon-Columbia River District.¹⁸

¹⁷The change in name of this Association occurred on April 1, 1948.

¹⁸Although not referred to in the complaint, and mentioned only indirectly at the hearing, Waterfront Employers of Washington, herein called the W.E.W., another regional employer association, in the State of Washington, is represented by the

The foregoing associations are collectively referred to herein as the Associations or the Employers. Reference to the regional or area Associations is to the WEAC or WECC as the context may require. A majority of the member-companies of the regional Associations are also members of the WEA. The officers of the WEA and those of the WEAC are identical.

Each of the companies listed in Appendix A is engaged in the loading, unloading, or handling of waterborne cargo at various ports on the Pacific Coast, and, in the course and conduct of its operations, loads, unloads, or handles a substantial amount of cargo in the course of transportation between various States of the United States, between the United States and non-contiguous territories or possessions, and between the United States and foreign countries.

During the year 1947, approximately 21 million tons of cargo was shipped from and into, and handled at, the various ports on the Pacific Coast by employer-members of said Association, to and from foreign ports over various world routes, generally referred to as the off-shore trade, and to and from various ports on the east coast, the territories of

W.E.A., as party to the contract, covering longshoremen in the State of Washington, in ports other than Tacoma, Port Angeles, and Anacortes. In those three ports, both the longshoremen and checkers are represented by the International Longshoremen's Association, commonly referred to as the I.L.A., affiliated with the American Federation of Labor, with which the W.E.W. has separate collective bargaining agreements.

Alaska and Hawaii, South America, China, and Australia, generally referred to as the coastwise trade. During the first 6 months of 1948, in excess of 10 million tons of cargo was thus shipped and handled by said employer-members. Approximately 12,000 longshoremen and carloaders, and 3,000 ship clerks or checkers were employed by said employers during this period on the Pacific Coast.¹⁹

Upon the basis of the foregoing, the entire record, including earlier findings of the Board relating to the business of these associations and their employer-members,²⁰ it is abundantly clear, and the undersigned finds, that the companies involved, employer-members of the several Associations as shown in Appendix A, are engaged in commerce within the meaning of the Act.

II. The labor organizations involved

International Longshoremen's and Warehousemen's Union, affiliated with the Congress of In-

¹⁹These findings are based upon the credible and undisputed testimony of James A. Robertson, secretary, since February, 1947, and acting secretary, since January, 1946, of the W.E.A.; Kenneth Saysette, treasurer, since 1946 of the W.E.A.; and Russell E. Ferguson, manager and secretary-treasurer, since 1946, and assistant manager from 1939 to 1946, of the W.E.O.C.; and the articles, amended articles of incorporation, and bylaws of the respective Associations, as well as other exhibits received in evidence.

²⁰See Matter of Waterfront Employers Association of the Pacific Coast, et al., 71 N.L.R.B. 80, 71 N.L.R.B. 121, of which the undersigned has taken official notice.

dustrial Organizations; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local No. 1-63; and Supercargoes and Checkers Union, Local 40 each affiliated with International Longshoremen's and Warehousemen's Union, are labor organizations admitting to membership employees of the companies, employer-members of the Associations.

III. The unfair labor practices

A. Introduction

On October 12, 1934, an arbitration award by the National Longshoremen's Board, appointed by President Roosevelt to mediate the protracted strike which had begun on May 9, 1934, ushered in a new era of labor relations in the longshore industry on the west coast. Aimed at stabilization of employment, equalization of earnings, and the elimination of evils in existing hiring practices, the award introduced the device of the joint hiring hall, under the supervision and control of Labor Relations Committees, on which the Employers and the Union were equally represented.

Longshoremen, the primary group involved in the strike, were then represented by Pacific Coast district locals of the International Longshoremen's Association, herein called the ILA, affiliated with the American Federation of Labor. In 1937, as a result of a change in affiliation of various locals on the west coast, the ILWU succeeded the ILA as bar-

gaining representative, and, in 1938, was certified by the Board as exclusive representative of the longshore employees.²¹

The award became the prototype for subsequent collective bargaining agreements between the parties. As amended from time to time, and interpreted by labor arbitrators' awards, it was incorporated by reference in later contracts including the one discussed hereinafter, which was terminated on June 15, 1948. In addition, the basic provisions of the award relating to hiring and dispatching through the joint hiring hall, the establishment of Labor Relations Committees, selection of hiring hall personnel, and definition of the duties and authority of the Committees, were embodied substantially as they appeared in the award.²²

²¹The history of organization and collective bargaining in the longshore industry on the west coast, both before and since the 1934 award; the circumstances surrounding the change in union affiliation of the employees involved; the nature and status of the Associations and their predecessors as employer representatives; and other historical data have been discussed in detail in several Board decisions, and is not reviewed here. See *Matter of Shipowners Association of the Pacific Coast, et al.*, 7 N. L. R. B. 1002; 32 N. L. R. B. 668; 33 N. L. R. B. 845; *Matter of Waterfront Employers Association of the Pacific Coast, et al.* 71 N. L. R. B. 80; 71 N. L. R. B. 121.

²²Except for preference of employment to union members, which did not appear until 1937, and some modifications, the pertinent sections of the provisions in the award are basically those quoted hereinafter, contained in the contract which expired on June 15, 1948.

Under the terms of the award, all longshoremen who had derived their livelihood from the industry for at least 12 months during the 3 years next proceeding May 9, 1934, were eligible for registration by the Port Labor Relations Committees, which were directed to compile registration lists of such longshoremen in each port within 30 days of the date of the award. After the completion of these lists, no longshoreman whose name did not appear thereon could be dispatched from the hiring halls, or employed, by any employer, while any registered longshoreman qualified, ready, and able to perform the work, was available. All, however, were to be dispatched "without favoritism or discrimination, regardless of union or non-union membership," and in such manner as to equalize earnings as nearly as practicable.²³

B. Registration of longshoremen, pursuant to the award, and since

With the entry of the award, Labor Relations Committees were established in the various ports, and preparations made for the registration of longshoremen who qualified under the prescribed formula. In those ports in which hiring halls had been previously maintained, existing registration lists were made available to the respective Port Labor Relations Committees to assist them in their task.²⁴

²³No attempt has been made to summarize comprehensively all the provisions of the award. Only those having relevance to the basic issues have been mentioned.

²⁴In the port of Tacoma, the hiring hall had been maintained and operated exclusively by the ILA; in

At the San Francisco port, where no hiring hall had been in existence, the Committee furnished applications to longshoremen claiming to be eligible for registration. The completed applications were processed by the Committee, which determined whether the applicants qualified for registration. Some applicants who were unable to qualify under the terms of the award were, nevertheless, permitted to register by mutual consent of the employer and union representatives of the Committee. In some instances where the union representatives objected to the registration of men actually qualified, the employer-members were able to prevail and to effect the registration of those applicants. Other applicants who could not qualify were permitted to register with the mutual consent of the employer and union members of the Committee. In general, however, those who were unable to qualify were issued "permits," cards bearing a registration number prefixed by the initial "P." Longshoremen who were fully qualified were assigned serial numbers, and issued brass checks, later replaced by identification cards, and "plugs."²⁵

Seattle, by the ILA and the employers, jointly; in Portland, jointly, but generally under the control of the employers; and in San Pedro, exclusively under employer control. Prior to the 1934 strike, registered longshoremen at these ports were generally dispatched before any others.

²⁵Fibre cylinders about $11\frac{1}{4}$ inches long and $\frac{3}{8}$ inches in diameter on which the serial number was imprinted. The designation "plugboard man," commonly used in the industry, derives from this source.

By February, 1935, of approximately 4,300 applicants, some 3,500 had been fully registered at the port of San Francisco, and a month later, the joint hiring hall was in operation. With the completion of registration in May, 1935, a roster of registered longshoremen in that port was prepared and copies were distributed to the employers, the ILA, and the hiring hall dispatchers.

Between 1935 and 1948, the Labor Relations Committee made some additions to the registration list, generally on a permit basis. The system of issuing permits remained in effect until July, 1947, when, upon their admission to membership in the ILWU, permit men were granted full registration by the Port Labor Relations Committee. Except for the period during World War II, no permits have since been issued. The comparatively few additions made, apart from the war years, have been on the basis of full registration as ILWU members. During the war, however, when the volume of shipping increased, and the number of longshoremen was insufficient to handle cargo flowing through the ports, a large number of permits was issued, exceeding at times the number of registered longshoremen.

In August, 1945, there were approximately 10,000 longshoremen either fully registered or permit men, in the port at San Francisco. During September and October, 1945, the Port Labor Relations Committee reduced this number by dropping from the list the last 1,000 permit men who had been enrolled. Since then, the number on the registration

list has been further reduced, so that as of the time of the original hearing there remained at the port of San Francisco a total of only 6,500 longshoremen, all fully registered.

During 1948, the only additions to the registration list were of longshoremen, formerly registered, who had left the industry, and since returned, and sons of longshoremen who wished to follow their fathers' calling. The number so registered has been comparatively small, and has been vastly exceeded by the number dropped from the roster. Such additions as have been made, since the original registration list was established, have usually been by mutual consent of the employer and union members of the Labor Relations Committee. Provisions have existed, however, in collective bargaining contracts executed since the original award, for recourse to arbitration by either party in the event of failure to agree upon additions to the registration list. On one occasion in 1936, when the industry experienced a shortage of longshoremen, the employer-members of the Committee sought to have the list opened for the addition of 350 longshoremen. Upon objection by the union members, the employer representatives resorted to arbitration. The dispute was settled without the necessity of a formal award, however, by agreement of the representatives to reopen the list for the addition of 500 longshoremen.²⁶

²⁶The same year a dispute arose in the port of Portland regarding registration of eligible long-

Although similar disputes have arisen on the issue of additions to the registration list, except for the occasions just mentioned, the employer members have not resorted to arbitration for this purpose. On the other hand, in 1943, when the union members of the Committee sought to have the names of four individuals added to the registration list, to which the employer members objected, the union members resorted to arbitration with the result that the names of those persons were added to the list.

From the time of the original registration in 1935, until 1937, union membership was not required as a prerequisite to registration, and, so far as the record discloses, there was no discrimination in the dispatching of registered longshoremen by reason of membership or non-membership in the Union. Since 1937, however, the parties have provided in the collective bargaining agreements for preference of employment to union members. Union members, therefore, have been dispatched in preference to non-union men, irrespective of when they had "plugged in." It was conceded at the hearing that, of the 6,500 registered longshoremen in the port of San Francisco, only 1 was not a member of the ILWU.²⁷

shoremen, to whom the Union had objected because they had failed to participate in the 1934 strike. It is not clear whether the employers resorted to arbitration, but the controversy was finally resolved by permitting all longshoremen who wished to return to work to register. Others voluntarily decided to leave the industry.

²⁷True Knowledge, whose case is discussed below.

Persons not previously employed in the longshore industry, who applied to an employer for work, have generally been referred by the employer to the Union. If the Union approved of the applicant and was willing to have his name added to the registration list, it initiated appropriate action with the Labor Relations Committee. If, however, it disapproved, and the employer members were unwilling to pursue the matter to arbitration, there was no way in which the applicant himself could obtain registration. He might, however, obtain employment as a casual by presenting himself at the hiring hall and awaiting opportunity to be dispatched after all registered longshoremen had been dispatched or had refused to accept such job assignments as were available.²⁸

Although the situation may have differed in immaterial respects the procedure outlined was also instituted in the various ports, and, in general, represents the system prevailing at the time of the hearing.

C. Registration of ship clerks and checkers

Ship clerks or checkers who perform the clerical work incidental to longshore operations are generally classified as monthly clerks and hourly or daily clerks. Monthly clerks are employed directly

²⁸Thus, the unloading of "banana boats," and the handling of cement bones, and other obnoxious cargo has usually been performed by non-registered men or casuals. About 50 per cent of the casuals have been engaged in the unloading of banana boats.

by the individual employer, without reference to registration lists, and are guaranteed a minimum number of hours of work each month. Prior to 1943, each group was bargained for in separate collective bargaining contracts in the various ports. Since then, they have been included in a single contract in each port.

The first contract covering ship clerks in the port of San Francisco was executed in April 1937. Under the terms of that contract, a Labor Relations Committee similar to the one dealing with long-shoremen was established, and, in May or June, 1937, the Committee instituted a registration list of ship clerks in San Francisco, covering daily clerks only.²⁹ The hiring hall was established, and

²⁹Daily clerks are further subdivided into preferred and casual clerks. The former report directly to the individual employer; the latter are dispatched from the hall, permitted to work for the duration of the particular job to which they have been dispatched, and then return to the hall to await further dispatch. Approximately 50 per cent of the ship clerks are dispatched through the hiring hall in San Francisco. The system varies in relatively minor respects from the port to port. For example in the port at Portland (Oregon-Columbia River area) the registration list includes both monthly and hourly clerks. In this area, too, the clerical employees are known as checkers, and the Labor Relations Committee is known as the Joint Checker Committee. In areas where registration lists, compiled either by employers or the Union, already existed these lists were made the basis of the new registration lists by mutual consent of the employer and union members of the Labor Relations Committees in the ports involved.

the rotary system of dispatching inaugurated. Unlike the longshoremen, registered clerks were issued no plugs, but merely signed their names to a register in the custody of a dispatcher, selected by the Union, but under the control of the Labor Relations Committee.

A further classification of ship clerks, designated permit clerks, was established, for whom a separate registration list was compiled. In contrast to registered ship clerks, permit clerks were issued plugs and dispatched through plugboards. They were dispatched, however, only when fully registered men were not available. If no registered or permit men were available, the dispatcher usually communicated with men desirous of obtaining regular employment as clerks, generally recommended by the Union, or others who might be waiting in the hiring hall for an opportunity to work. When dispatched, they would be furnished a slip permitting them to work only 1 day or until the completion of the job. During August, 1948, this occurred frequently due to the unusual volume of cargo handled.

Persons desiring employment who have never worked as ship clerks ordinarily obtain the recommendation of a union member and then apply to the dispatcher. As in the case of longshoremen, additions to the registration list are proposed by members of the Labor Relations Committee. If both the employer and union members of the Committee consent, the person's name is added to the list, usually as permit man, until admitted to membership in the Union, at which time he may become

fully registered. Although persons recommended for employment as clerks by the union members of the Committee have generally been accepted for registration, there have been instances when those recommended by employer members have not been approved. The record does not disclose whether in those instances the employer members have pursued the matter to arbitration.

Although the facts concerning ship clerks, outlined above, are primarily those relating to the port at San Francisco, they apply substantially to the other ports as well, and reflect the situation existing at the time of the hearing at all ports involved.

D. The joint hiring hall and its operation

The hiring hall described here is, essentially, the one maintained and operated for the dispatching of longshoremen in the port of San Francisco. Inasmuch as the one maintained for ship clerks at this port, as well as those for both longshoremen and ship clerks or checkers, in other ports involved, are of substantially the same type, they will not be discussed separately. For the purposes of this report, what will be said concerning the longshore hiring hall in San Francisco, and the practices and procedures which have evolved, is intended to apply equally to the remaining hiring halls. The conditions described are, in substance those prevailing at the time of the hearing.

Since the 1934 award, central hiring halls have been maintained in the ports of Seattle, Portland,

San Francisco, and Los Angeles, under the joint Labor Relations Committees originally created under the award. Expense of maintaining the hiring hall has been shared equally by the regional employer association and the Union in each port.³⁰ Registered longshoremen not members of the Union have been required, by the award and succeeding contracts, to contribute to the Port Labor Relations Committee their pro rata share of the expense, equivalent, in effect, to dues paid by union members.³¹ In San Francisco, the Labor Relations Committee established a joint bank account, to which the Employers and the Union made equal contributions. At the time of the hearing, the balance in this account was \$10,000. Once each month, the Labor Relations Committee submits bills to the respective parties for one-half the actual expenses incurred by the Committee during the preceding month.

Except for the dispatchers, elected for a stated term by the Union, personnel at the hiring hall are

³⁰All references to the Union, prior to 1937, are, of course, to the ILA.

³¹This provision has never been enforced in San Francisco, nor, so far as the record discloses, in other ports. In actual practice, fees due from permit men, to whom this provision would presumably apply, have been paid to the Union. Although requested by the employer members of the Labor Relations Committee, to turn over, or account for, these fees, the Union has failed to do so. The employer members, however, have not undertaken to pursue the matter.

selected by, and are under the supervision and control of the Port Labor Relations Committee. At San Francisco, there are six dispatchers, including a chief and assistant chief dispatcher, all of whose salaries are paid by the Committee. The hiring hall is under the immediate supervision and control of the chief dispatcher.

1. Dispatching procedures

Registered longshoremen are comprised of regular gangs and plugboard men. Regular gangs, authorized and established by the Port Labor Relations Committee, consists of 11 men, viz., 1 gang boss, 2 winch drivers, 6 hold men, and 2 dock men, who work as a unit under the gang boss. Plugboard men are longshoremen not assigned to regular gangs, but who work as individuals, dispatched through the hiring hall. During July, 1948, there were approximately 258 regular gangs, comprising about 50 per cent of the registered longshoremen, in the port of San Francisco.

a. "Plugboard" men

Plugboard men report to the hiring hall at the regular dispatching hours, between 6:30 and 8:30 a.m., for day work, and between 4 and 6 p.m., for night work.³² Separate boards containing consecutively numbered holes are maintained at the hall, covering day and night work, and the various job

³²Although jobs are dispatched at times other than the regular dispatching hours, registered longshoremen are not required to accept such jobs.

classifications of longshore work, as e.g., dock men, tractor ("jitney") drivers, lift truck drivers, etc. By inserting the plug at the first available place on the board which corresponds to his preference for day or night work in a desired classification, the plugboard man selects the job for which he wishes to be dispatched.³³

The employers notify the dispatcher, in advance of the dispatching hours, of the number of men they will require in each category. When the time for dispatching arrives, the dispatcher removes the plugs from the various boards in order of numerical sequence, and notifies the longshoremen whose plug has been removed, over a public address system, that he is about to be dispatched. The first man to be so dispatched in each job classification is the one who has "plugged in" first on the appropriate board. The next man dispatched in the same classification is the one who has "plugged in" next in order, etc. Thus, rotation of dispatching is accomplished. The man to be dispatched reports to the dispatching window, obtains a slip containing his orders, and then presents himself at the job to which he has been assigned. A plugboard man failing to respond, after being called over the public address system three times, forfeits the opportunity

³³Special qualifications, established by the Port Labor Relations Committee, as well as prior approval of the Committee, are required for the jobs of gang boss, winch driver, and lift truck driver, and only those who have been qualified may plug in for those jobs.

to work the remainder of that day, unless excused by the dispatcher.

If, after all available plugboard men have been dispatched, jobs are still unfilled, these jobs are, in practice, filled by the dispatcher from among members of locals affiliated with the Union, which have been notified of the job opportunity. On the rare occasion when the dispatcher is unable to fill all remaining jobs from these sources, he notifies the employers, who are then at liberty to hire from any source. Non-registered longshoremen, hired in this manner, are permitted to work the day they are dispatched, but may not work the next day if a registered man is available who claims the job.

b. Regular gangs

The dispatching procedure with respect to regular gangs is somewhat different. Because employers generally prefer regular gangs, of which there are frequent shortages, a method has been devised to distribute gangs among employers who desire them as equitably as possible. The employers notify the office of the WEA manager by 10:30 a.m. daily of the number of gangs they want. When all the orders have been received for the day, the manager, or members of his staff check the orders against the number of available gangs, and allocate them among the employers, having regard for the arrival time and importance of vessels, and the nature of the cargo. The information is then telephoned to the chief dispatcher. When the gang boss, under instructions from the chief dispatcher, telephones

for his orders, the dispatcher furnishes him with the name of the vessel to which the gang is to report, the pier at which it is berthed, and the number of men required. Substitutes for gang members, when necessary because of illness or other absence, are procured from the hiring hall by means of the plugboard. The rotary system is also employed with respect to regular gangs which are dispatched as units.

In the case of both longshoremen and ship clerks, the rotary system of dispatching has, however, been subject to an arrangement designed to equalize earnings. Formerly, the various Labor Relations Committees established the maximum number of hours these employees might work in any given week. Late in 1947, or early in 1948, as a matter of convenience, the Committees permitted the dispatchers to make this determination. The number of hours in each workweek, which fluctuates from time to time, is posted at the hiring hall, and, before an employee is dispatched, the dispatcher ascertains whether he has already fulfilled the quota for the week.

Although the Employers have charged that dispatchers, under instructions from the Union, have arbitrarily exceeded their authority, by laying off and adding gangs, or changing or limiting the "make-up" of gangs, no specific instances were offered at the hearing in support of this claim. According to the undisputed testimony of WEAC Manager Gregory, however, this dispute was pend-

ing before the Coast Labor Relations Committee, presumably because of the failure of the Port Labor Relations Committee to settle this controversy.

E. Instances of alleged discriminatory treatment attributed to the Union

It should be borne in mind that the evidence, presently discussed, was offered by the General Counsel, and received, solely for the purpose of illustrating the manner in which the hiring and dispatching procedures were administered in specific instances. No remedy is sought on behalf of the persons alleged to have been discriminated against, nor is any remedy available to them within the framework of the complaint, as amended. Primarily, the evidence relates to a longshoreman, known as True Knowledge. During the course of the undisputed testimony of WEAC Manager Gregory, however, evidence was elicited, not specifically alleged in the complaint, as amended,³⁴ dealing with a ship clerk, named George Phelan, and another, Cole, Jackman, a former longshoreman.

1. George Phelan—ship clerk

This evidence disclosed that late in 1947, Phelan complained to WEAC Manager Gregory that Dispatcher James Roache had refused to dispatch him from the hiring hall at San Francisco, despite the

³⁴Aside from the general allegation that the registration, hiring, and dispatching practices and procedures are, in practical operation, discriminatory.

fact that he was a registered ship clerk, and a member of the Union. Gregory raised the matter before the Labor Relations Committee. After the case had been considered at several sessions, the union members of the Committee agreed that Phelan should be dispatched. The case was regarded settled, and he returned to work in January, continuing until about the middle of May, 1948.

Later, Phelan reported to Manager Gregory that the dispatcher had again refused to dispatch him, twice during May, and early in June. Meanwhile, on about June 1, the Union had notified Gregory that Phelan had been expelled on about May 15, 1948, and requested that his name be removed from the registration list. At the time of this request, according to Gregory, no reason was given. When the case was later reopened before the Labor Relations Committee by Gregory, the reason advanced by the Union was that Phelan had not made himself available for work. Gregory testified that, when questioned, the dispatcher denied that Phelan had been in the hiring hall on the days in question. Phelan, according to Gregory, was equally insistent that he had. In his testimony, Gregory admitted that he had not examined the registration records to determine whether Phelan had actually signed in on the days in question, as required in order to be eligible to be dispatched.

Gregory also testified that he advised Phelan that he would present his complaint to the Labor Relations Committee if he desired to pursue the matter, but that Phelan declined the offer. A charge

arising out of this controversy was filed with the Board, but later abandoned. Phelan's name has not since been removed from the registration list, but he has not been dispatched since May 15, 1948. There was no showing, however, that he has made himself available at the hiring hall since that date. Gregory conceded at the hearing that this was the only instance of a formal complaint to the Labor Relations Committee regarding the failure or refusal to dispatch clerks eligible for such work.

Without regard to the question of the effect of Phelan's expulsion from the Union upon his right to enjoy preference of employment, under the existing contract, the absence of any probative evidence that the dispatcher actually failed to dispatch him, or that Phelan even made himself available to be dispatched on the days he claimed to have been denied employment, precludes any finding that the hiring and dispatching procedures were applied discriminatorily against him. No such finding is made.

2. Cole Jackman—ship clerk

Further uncontradicted evidence was elicited, during the examination of WEAC Manager Gregory, of alleged favoritism in the dispatching of Cole Jackman, a member of the Union, and of the Negotiating Committee for Ship Clerks. According to Gregory, Jackman, a longshoreman at San Francisco on a visitor's permit from Portland in January and February, 1948, but never registered as a ship clerk, was dispatched regularly in that capacity from March to September 1, 1948. During March

and April, 1948, Gregory testified, Jackman's earnings were relatively higher than the average for ship clerks at that port. The evidence does not disclose whether this matter was the subject of any protest by the employer members of the Labor Relations Committee.

In the absence of any satisfactory explanation, the undersigned concludes and finds that this departure from the provisions and practices regarding the registration and dispatching of clerks, during the period involved, affords evidence of an instance of discrimination on account of union membership. Such preference of employment, even if permissible under the existing contract, was in obvious disregard of the provisions requiring registration as a condition precedent to eligibility for regular employment. Relatively few non-registered clerks were dispatched through the hiring hall during this period, except during July and August, when the number increased considerably. Such clerks, however, were entitled to be dispatched only after all available registered clerks had been offered, and accepted or rejected, opportunity for employment.

3. The Cause of True Knowledge

In August, 1933, Charles W. Ross, Jr., who had been employed as a longshoreman for some 12 years, principally in the San Francisco Bay area, joined the ILA as a charter member. He remained a member of that union until it was succeeded as bargaining agent by the ILWU, when he joined that labor organization, continuing his membership

until January, 1948. He was among those registered in the initial registration at the port of San Francisco in 1935, and was assigned registration #1766. During his employment on the waterfront, he performed every type of longshore work, as a plug-board man, except that of winch driver and jitney driver.

In the spring of 1935, apparently Ross became a follower of Father Divine and adopted the name of True Knowledge.³⁵ He continued in his calling as a longshoreman under the same registration number until the early summer of 1948. During World War II, because of his religious scruples, he refused to handle war cargo, and worked exclusively at the Matson Dock, piers 30 and 32, where only commercial cargo was handled. So far as the record discloses, no objection was made by the employers or the ILWU to this arrangement.

On September 30, 1946, the ILWU and other

³⁵Although the person testifying at the hearing identified himself as True Knowledge, and affirmed that he "bear[s] no record" of anyone named Charles W. Ross, Jr., he acknowledged that he had always been registered as a longshoreman under registration #1766. It was stipulated between all parties that registration #1766 had been assigned in the original registration to Charles W. Ross, Jr. While it appears from the witness' testimony as a whole that his religious convictions prevented him from "bearing any record" of existence prior to 1935, when he became converted and reborn as True Knowledge, it can be reasonably inferred, on the temporal level, that True Knowledge and Charles W. Ross, Jr., are one and the same. The undersigned so finds.

maritime unions on the west coast engaged in a strike which lasted until early December of that year. When it had appeared that the strike was imminent, True Knowledge applied to the ILWU Clearance Committee for exemption from picket duty because of a conflict with his religious convictions. No action was taken on his request, and when the strike ended about December 5, True Knowledge returned to work.

He had been working 7 or 8 days, when his walking boss, a union member, under whose supervision he had been working 3 or 4 years, told him that he would have to obtain a clearance card from the ILWU Clearance Committee. When he applied to that Committee, he was questioned as to the reason he had failed to engage in picket duty during the strike. Rejecting his answer as unsatisfactory, the Committee refused him clearance, but advised him of his right to appeal to the ILWU Executive Board. His appeal to that Board, and later, to the general membership of ILWU Local 10, were both denied after hearing.

In January or February, 1947, the Union notified the Labor Relations Committee that True Knowledge had been expelled from membership, and requested that his name be removed from the list of registered longshoremen. The employer members of the Committee refused. From about mid-December, 1946, until early February, 1947, when the matter was brought up by Gregory before the Labor Relations Committee, True Knowledge was denied opportunity to work on the waterfront. After several

conferences, a settlement was finally effected by the Committee, on April 29, 1947, which permitted him to be dispatched as a fully registered long-shoreman, without union preference, but before permit men could be dispatched.³⁶

He returned to work next day and worked fairly steadily thereafter until about August, 1947, when all existing permit men were either admitted to membership in the Union, and granted full registration, or removed from the list. True Knowledge,

³⁶Excerpts from the minutes of the Labor Relations Committee of April 29, 1947, disclose the actual terms of settlement:

True Knowledge Case

The case of True Knowledge (minutes of 1/7-14/47) was discussed by the Committee. Union stated that they had come to the following conclusions:

1. On the basis of the [Wayne] Morse Award, [not relating specifically to this case] True Knowledge will be permitted to work in the port and will be dispatched for work as a man registered in the industry, but only after all full Union members have been dispatched, and before permit men are dispatched.

2. True Knowledge can plug in to any desired section of the board and when dispatched shall work for the duration of the job to which he is dispatched.

3. True Knowledge is to live up to all rules and regulations of the Hiring Hall. Employers agreed to this agreement. True Knowledge was present before the Committee and also agreed to this arrangement for work on the San Francisco Waterfront and stated that he would contact the Chief Dispatcher in order to make proper arrangements as to where he would plug in for work. Case closed.

however, was neither removed from the registration list nor restored to membership. He continued to report to the hiring hall thereafter. Under the settlement, True Knowledge was permitted to plug in on any board, applicable to a job classification for which he was qualified. His plug would not be removed, however, until the plugs of all union members on the same board had been "pulled," without regard to when they had "plugged in." Thus, True Knowledge would be the last person to be dispatched from the board in that particular category. Some times, True Knowledge testified, he would remain at the hiring hall all day waiting to accept a job others had refused. As has been mentioned, the quota of hours to be worked each week was posted at the hall. During the period from April 30, 1947, to January 1, 1948, he worked the posted weekly quota infrequently.³⁷

Beginning in January 1948, the dispatchers refused to dispatch him at all until all the longshoremen who had "plugged in" on all plugboards had first been dispatched. Thus, even when True Knowl-

³⁷Since the record does not disclose what proportion of longshoremen, if any, actually worked the full quota, no finding of disparate treatment is based on this factor. On cross-examination of True Knowledge, however, testimony was elicited that, at the hearing before the Labor Relations Committee, an employer had stated that True Knowledge had worked only half the number of hours worked by other registered longshoremen during this period. The undersigned regards this evidence of insufficient probative value to support a finding.

edge's plug was reached on a particular board, the dispatcher would refuse to dispatch him until all plugs on all other boards had been "pulled." He complained to the various dispatchers several times over a period of 4 or 5 months, and finally protested to Chief Dispatcher James Sutter that this was contrary to the agreement reached by the Labor Relations Committee. He was told that he had no right to work as long as union men were available. On several occasions, when he complained to a dispatcher, whom True Knowledge could identify only by general physical description, and the first name, Walter, he was told that he would not be given an opportunity to work as long as the dispatcher could obtain anyone else. Similar complaints to Acting Chief Dispatcher Charles Mayfield were equally unavailing.

True Knowledge continued to "plug in" until about mid-June, 1948, three times the last week, during which he was dispatched to one job lasting 2 days. He plugged in once or twice after that, without avail, and, on June 24, 1948, finally withdrew from the waterfront, abandoning further effort to obtain work in the industry.

Although his dues in the ILWU had been paid only to January, 1947, there was no contention that the action taken by the Union or the dispatchers was in any way based on failure to maintain his dues paying membership. On the contrary, the record as a whole establishes that the treatment accorded him stemmed solely from his failure to

engage in picket duty during the strike in the fall of 1946.³⁸

The General Counsel contends that the instances recited support the allegations of the complaint, as amended, and the general contention that the hiring hall provisions, including those dealing with registration and dispatching, and the practices and procedures thereunder, have, in practical operation, resulted in discrimination on account of membership or non-membership in the Union. This contention is discussed hereinafter.

³⁸At the close of True Knowledge's testimony, the Respondents moved to strike the same on two grounds. First, that the witness had, because of his religious beliefs, testified under an affirmation rather than an oath, and that the Board's Rules and Regulations provide that, "Witnesses shall be examined orally under oath . . . "Sec. 203.30. See, however, Sec. 203.35 (a), which grants trial examiners authority to administer oaths and affirmations. Cf. Also, Matter of Union Starch & Refining Co., 82 N. L. R. B., No. 60. As a further ground for the motion to strike, the Respondents contended that the witness' testimony was palpably unreliable. Reference was presumably to the witness' frequent digressions into the realm of metaphysics during which he expatiated upon his religious convictions. Abstruse and recondite as these portions of his testimony may have seemed to some, those dealing with more mundane affairs, including the history of his employment on the waterfront, his union affiliations, his refusal to picket during the 1946 strike, the later consequences to his employment opportunities, and the manner in which he was dispatched thereafter, corroborated in material respects by WEAC Manager Gregory, were clear, lucid, plausible, and persuasive. The motion was denied.

F. The collective bargaining agreements in effect on February 13, 1948

Since February, 1937, the collective bargaining agreements between the WEA and the ILWU have provided, among other things, for the registration, hiring, and dispatching of longshoremen through the joint hiring hall, and for preference of employment for ILWU members. Provisions corresponding substantially to those in the longshore agreements have been included in separate agreements covering ship clerks and checkers in the various ports. Unlike the longshore contracts, which have been negotiated on a coastwise basis, the checkers' contracts, though negotiated by the WEA on behalf of the regional associations and their respective members, on the one hand, and the ILWU, on behalf its respective locals, on the other, have resulted in separate contracts for the port areas. The discussion of these controversial issues, and the findings and ultimate conclusions, while generally dealing with the longshore contracts are intended to apply equally, unless otherwise indicated, to the corresponding provisions, practices and procedures, regarding ship clerks and checkers.

The last agreement, prior to the original hearing, generally referred to as the Coast Longshore Agreement, dated June 6, 1947, was for a term of 1 year from June 16, 1947, automatically renewable annually in the absence of 60 days' notice by either party. The agreement expressly incorporated by reference, and extended and renewed, as modified

by the instant agreement, the 1934 award, as amended on various dates between February 4, 1937, and November 17, 1946, and as interpreted by various arbitrators' awards.³⁹ An agreement, dated December 20, 1940, covering longshore work on steam schooners operated by WEA members, and adopting generally the provisions of the then existing agreement, was subsequently extended or renewed to coincide with the terminal date of the longshore agreement.⁴⁰ On February 3, 1948, the longshore agreement was amended to reflect an award by the Impartial Chairman, provided for

³⁹The parties to this agreement were the WEA, WEAC, WEP, since, the WEOC, and the WEW, designated as the Employers, on behalf of their respective members, and the ILWU.

⁴⁰At the time of the 1934 award, to which the WEA was not a party, only one of its members was engaged in the operation of steam schooners as well as "deep water" ships. Some 2 years later, the Sailors Union of the Pacific (SUP), representing deck crews of the steam schooners, and the ILA, which then represented the longshoremen, agreed to divide longshore work on steam schooners between them. The steam schooner agreement mentioned in the text provided generally that the 1934 award should govern longshore work by ILA members in connection with steam schooners operated by WEA members. The "return to work agreement," dated November 17, 1946, settling the strike of that year, defines the steam schooner, or as it is also known, the coast-wise trade as the operation of steam schooners between the ports of California, Oregon, and Washington, and between those ports and British Columbia and Alaska, excluding vessels operated between Seattle and Puget Sound ports and Alaska.

in the agreement, granting an increase in basic wage rates, effective February 10, 1948.

Checkers agreements, in effect at this time in the various port areas, had been executed on varying dates, and, as modified, were renewed and extended until June 15, 1948, the expiration date of the longshore contract. In the Oregon-Columbia River District, separate collective bargaining agreements, for hourly and monthly checkers, were entered, on June 14, 1937, between the Waterfront Employers of Portland, later the WEOC, and Supercargoes and Checkers Local 38-78-A, ILA, later succeeded by ILWU Local 1-40. The agreement was for a term ending September 30, 1937, subject to automatic renewal annually in the absence of 60 days' notice. An amendment increasing the basic wage rates was executed on March 10, 1942.

In the San Francisco Bay area, the contract between the WEAC and ILWU District No. 1, acting on behalf of Ship Clerks' Association, Local 1-34, was executed March 28, 1946, effective on a daily basis, subject to 24 hours' notice of termination.

In the Los Angeles-Long Beach Harbor area, the WEAC and Marine Clerks Association, Local 1-63, ILWU, entered into a contract, dated November 26, 1946, expiring June 15, 1947, subject to automatic renewal in the absence of 60 days' notice. On January 2, 1947, pursuant to provision for a wage review, an amendment was executed increasing basic wage rates.

Effective February 10, 1948, the checker agreements in each port, were further amended to reflect

the award of the Impartial Chairman granting a further increase in basic wage rates, corresponding to the one given longshoremen.

The Foregoing checkers' agreements were, in effect, consolidated by an agreement entered on June 16, 1947, whereby the WEA, on behalf of WEP, later WEOC, the WEAC, and their respective members, and the ILWU, agreed to execute a master agreement, "embracing those contract sections of the [clerks and checkers agreements above described] which are identical in substance," terminating on June 15, 1948, subject to automatic renewal in the absence of 60 days' notice.⁴¹ As modified by the June 16, 1947, agreement, the several clerks and checkers port agreements were to be renewed until June 15, 1948, and were to constitute "port supplemental and/or working rules" to the master agreement. The agreement, conditioned upon the consummation of satisfactory agreements, on or before June 16, 1947, between Pacific American Shipowners Association, known as PASA, and the National Union of Marine Cooks and Stewards, and the American Communications Association, was entered without prejudice to the

⁴¹Also to be included in this master agreement, were similar provisions appearing in a former agreement between the ILWU, on behalf of Local 46, and the Pacific Naval Air Base Contractors, not affiliated with any of the employer associations involved, dated July 1, 1942, but under which the WEAC had been operating in the Port of Hueneme, as such contract had been interpreted and applied by the Labor Relations Committee in that port.

position of either party under the Board's decision in Case No. 20-R-1690.⁴²

Although it is not altogether clear whether the master agreement was in fact executed thereafter, it is apparent that the parties regarded the terminal dates of each of the outstanding checker contracts as having been extended to June 15, 1948, to coincide with that of the Coast Longshore Agreement.

1. The hiring hall and related provisions in the
Coast Longshore Agreement

With respect to the hiring hall, and related matters, the June 6, 1947, Coast Longshore Agreement, generally patterned on the 1934 award, provided:

Section 4. The hiring of all longshoremen shall be through halls maintained and operated jointly by the [ILWU] and the respective employers' associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los Angeles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. A branch hiring hall shall be opened in the East Bay area of San Francisco harbor. All expense of the hiring halls shall be borne one-half by the [ILWU] and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the [ILWU] shall pay to the Labor Relations Committee toward

⁴²This reservation was apparently intended to preserve the ILWU's right to demand collective bargaining for checkers on a coastwise basis, and the Employers right to oppose it.

the support of the hall a sum equal to the pro rata share of the expense of the support of the hall by each member of the [ILWU].

Section 5. The personnel for each hiring hall with the exception of dispatchers, shall be determined and appointed by the Labor Relations Committee of the port. Dispatchers shall be selected by the Union through elections in which all candidates shall qualify according to standards prescribed and measured by the Labor Relations Committee of the port. If they fail to agree on the appropriate standards or upon whether a candidate is qualified under the standards, the dispute shall be decided by the Impartial Chairman or, at his discretion, by a Port Arbitrator.

Dispatchers shall hold office for one year and neither the constitution nor any rule of the Union or any of its locals shall abridge the right of the dispatcher to hold office for one year or to run to succeed himself as often as he may choose.

Both the Employers and the Union shall be permitted to maintain a representative in each hiring hall at all times.

Section 6. Preference of employment shall be given to members of the Pacific Coast District [ILWU] whenever available. This section shall not deprive the employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.

Section 8. The hiring and dispatching of long-shoremen in all ports covered by this award other than those mentioned in Section 4, and excepting Tacoma, shall be done as provided for the ports mentioned in Section 4; unless the Labor Relations Committee in any of such ports establishes other methods of hiring or dispatching.

Section 9. The parties shall immediately establish and maintain during the existence of this agreement a Coast Labor Relations Committee of seven (7) members, three (3) to be designated by the Union, three (3) to be designated by the Employers, and the seventh to be the Impartial Chairman who shall be designated in accordance with the provisions of this contract. There shall also be established and maintained throughout the existence of this agreement a Port Labor Relations Committee for each port affected by this agreement composed of three (3) representatives designated by the Employers Association of the port and three (3) representatives designated by the local Union. By mutual consent any Labor Relations Committee may change the number of representatives of the respective parties . . .

[Section 9 further authorized the Coast Labor Relations Committee to determine questions involving the interpretation of the agreement, and to decide disputes thereunder, and provided for the appointment of an Impartial Chairman with authority to determine issues unresolved by that Committee. In addition to presiding over the Committee, the Impartial Chairman was authorized to cast a

deciding vote in the event of a tie within the Committee, or upon request of either party; to preside as arbitrator at formal hearings; to select a port agent for each of the districts of Puget Sound, Columbia River, and Northern and Southern California; and to appoint a Port Arbitrator, upon the joint request of the parties in specific cases, to determine disputes unresolved by the Port Labor Relations Committee which, in the judgment of the Port Arbitrator, were not of coastwide significance. All decisions of the Impartial Chairman and of the Port Arbitrator were to be final and binding upon the parties. Expenses and compensation of the Impartial Chairman and the port agents were to be borne equally by the parties.]

Section 10. Subject to the control and direction of the Coast Labor Relations Committee, the duties of the Port Labor Relations Committee shall be:

(a) To maintain and operate the hiring hall;

(b) To have complete control of the registration lists of the regular Longshoremen of the Port including the power to make such additional registrations of the longshoremen as may be necessary; no longshoremen not on such a list shall be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work;

(c) To decide questions regarding rotation of gangs and extra men; revision of existing lists of extra men and of casuals; and the addi-

tion of new men to the industry when needed;

(d) To investigate and adjudicate all grievances and disputes relating to working agreements;

(e) To decide all grievances relating to discharges. The hearing and investigation of grievances relating to discharges shall be given preference over all other business before the Committee. In case of discharge without sufficient cause, the Committee may order payment for lost time or reinstatement with or without payment for time lost;

(f) To decide any other question of mutual concern relating to the industry and not covered by this agreement.⁴³

2. Subsequent negotiations

Although the existing collective bargaining agreements did not require formal notice of intention to modify or terminate the contracts before April 15, 1948, on February 13, 1948, WEA President F. P. Foisie wrote the ILWU suggesting an early conference to consider the problem of conforming the contracts, when renewed, to the Labor Management

⁴³As originally drawn, the complaint alleged that, during bargaining negotiations since about February 21, 1948, the ILWU had demanded and insisted on the inclusion in any contract reached with the WEA, of Sections 4, 5, and 10, quoted above, in haec verba. It was not alleged in the complaint, or contended at the hearing, that the ILWU, during this period, had similarly insisted on the inclusion of Section 6, dealing with preference of employment.

Relations Act, 1947. Specifically, Foisie contended that the provisions in the Coast Longshore Agreement relating to preference of employment, control of registration, and the hiring hall, would conflict with the Act after June 15, 1948, the terminal date of the contract, and that it would be necessary to modify the contract, the various port supplements, and the working and dispatching rules thereunder to conform to the law.

A series of four exploratory meetings were held for this purpose between February 21, and April 5, 1948. Representing the parties at the first of these meetings, and, in general, thereafter, were some or all of the following, or their subordinates. Appearing for the WEA, President Foisie, Vice-President and General Manager Henry W. Clark,⁴⁴ Gregory A. Harrison and Marion B. Plant, of WEA counsel, Secretary James B. Robertson, and other WEA staff members;⁴⁵ for the ILWU, President Harry R. Bridges, Vice-President Germaine Bulcke, Messrs. Henry Schmidt and H. J. Bodine, union members of the Coast Labor Relations Committee, and other staff members of the ILWU, in-

⁴⁴Clark was also an employer representative on the Coast Longshore General Negotiating Committee, and an employer-member of the Coast Labor Relations Committee.

⁴⁵Present at the first meeting in an unofficial capacity, presumably because of his interest in similar issues involved in the contract between the Pacific American Shipowners Association, known as PASA, and the National Union of Marine Cooks and Stewards, a CIO affiliate, was PASA President James G. Bryan.

cluding Research Director Lincoln Fairley. Principal spokesmen for the respective parties were Attorney Harrison and President Bridges.

At the outset, Bridges denied that the provisions in question were in conflict with the Act, and recommended that the parties refrain from giving notice of termination, and permit the contract to renew itself. The suggestion was rejected.

As developed during these conferences, and elaborated in an exchange of memoranda, the position of the parties was substantially as follows: The Employers, though willing to continue the hiring hall as a means of dispatching longshoremen, insisted on exclusive employer control. They maintained that, in order to conform to the Act, it would be necessary to eliminate preference of employment to union members, selection of dispatchers by the Union, and participation by it through the Labor Relations Committee, in the making of additions to the registration list. The Union, on the other hand, while conceding that preference of employment based on union membership might conflict with the Act, maintained that the provisions relating to union selection of dispatchers, and joint control of the registration list were not incompatible with the Act. In this connection, Bridges contended that the Act did not undertake to regulate the selection of hiring hall personnel. Dispatchers under the control of the Labor Relations Committee, he maintained, do not hire, or even control hiring, but merely perform routine duties in dispatching in rotation persons on the registration list, which the

Employers have committed themselves to use. In addition, he pointed out, since Employers are at liberty to reject, for cause, any persons dispatched, it is obvious that Employers retain effective control over the selection of employees. Moreover, he argued, dispatchers who fail to observe the working and dispatching rules promulgated by the Labor Relations Committee subject themselves to censure or removal under the grievance procedure provided in the contract. The Employers, however, while conceding that this might be technically true, protested that in actual practice dispatchers enjoy considerable discretion which they exercise to favor union members, and to discriminate against non-union longshoremen.

Regarding the Employers' objection to union participation in control of registration, Bridges pointed to the provisions in the contract granting the employer representatives the right to resort to arbitration in the event of refusal by union members of the Committee to join in making additions to the registration list which the Employers desired. Parenthetically, he observed, the list already included persons whom the Union regarded as objectionable, but who had, nevertheless, been retained on the registration list.

Except for some area of agreement on the probable necessity for modifying the preference of employment provisions, the parties appeared to be in irreconcilable disagreement. In an attempt to resolve the conflict regarding selection of dispatchers, which he termed "a fighting issue," Bridges proposed that

authority to make such selection be vested in the Impartial Chairman, or alternatively, that the existing provisions be continued in effect until "a legal determination." Rejecting these suggestions, the Employers countered with a proposal that dispatchers be selected by the Director of Federal Mediation and Conciliation Service, FMCS herein, his appointee, or some other neutral person. This, the Union refused.

An employer suggestion that the hiring hall problem be settled by a union authorization election proved equally unacceptable. Consideration of the so-called "Lundeberg Formula" was abandoned when it was admitted by the Employers that it resulted, in effect, in an open shop.⁴⁶ Although ex-

⁴⁶The pertinent provisions in the contract between the Steamship companies in the inter-coastal, off-shore, and Alaska trades, and the Sailors Union of the Pacific, dated October 2, 1947, commonly referred to in the maritime industry as the "Lundeberg Formula," are:

Section 2. (a) The Employers agree in the hiring of employees in the classifications covered by this agreement to prefer applicants who have previously been employed on the vessels of one or more of the companies signatory to this agreement and the Union agrees that in furnishing deck personnel to employers through the facilities of their employment office it will recognize such preference and furnish seamen to the employers with due regard thereto and to the competency and dependability of the employees furnished; when Ordinary Seamen with prior experience are not available, the Union will in dispatching seamen prefer graduates of the Andrew Furuseth Training School.

(b) When an employer rejects men furnished

pressing a desire to resolve the hiring hall issues, Bridges firmly announced that the Union would oppose any change in practices which would restore the conditions which had prevailed prior to 1934. He suggested, however, that the Union might be willing to eliminate the preference clause entirely, substituting a provision for preference of employment, based on seniority, to registered longshoremen presently working in the industry, and, preference in new registrations, to longshoremen formerly registered and employed in the industry, who had not been dropped for cause or reasons other than lack of employment. Under this proposal, reductions in the registration list, necessitated by lack of work, would similarly be determined on the basis of seniority. Any new additions would be registered by the Labor Relations Committee, as provided in the existing contract, and disputes regarding such additions, resolved under the existing grievance procedure. Since, Bridges contended, these modifications would virtually result in open-shop conditions, he proposed that the contract be amended to relieve the Union of responsibility for disciplining its members for various infractions, including illegal work stoppages; to eliminate penalties for various

who are considered unsuitable or unsatisfactory, the employer shall furnish a statement in writing to the Union stating the reason for the rejection and the Union may thereupon refer the matter to the Port Committee and the Port Committee shall then hear the case.

Section 3. The employers agree not to discriminate against any man for legitimate Union Activity.

derelictions by longshoremen; and to provide that cessation of work by registered longshoremen, individually or in groups, should not constitute a violation of the contract, unless sponsored or authorized by the Union. Although the Employers expressed willingness to assume responsibility for disciplining longshoremen, they insisted that they would require assurance that any contract reached with the Union would be faithfully performed and observed.

A union proposal, on March 29, to continue the existing hiring hall provisions, subject to a so-called "savings clause," requiring renegotiation of these issues in the event of a legally binding decision invalidating the provisions, was rejected by the Employers.

G. Reopening of the contracts; subsequent negotiations

At this juncture, in a conference on April 5, 1948, the ILWU served formal notice reopening the Coast Longshore Agreement, which it coupled with the following contract demands: (1) continuance of the existing longshore hiring halls, with adequate guarantees that there would be no return to the hiring and employment practices which prevailed prior to 1934; (2) liberalization of vacation provisions; (3) unspecified basic wage increases; (4) elimination of existing contract provisions requiring the Union to discipline and impose penalties upon members for various infractions of rules and contract provisions; (5) reduction in work shift from 10 to 8 hours,

without reduction in take-home pay; (6) incorporation of Longshore Safety Commission recommendations; (7) 4 hours minimum pay to men ordered to work when no work is provided; (8) payment to longshoremen not dispatched when required to report to the hiring hall; (9) additional penalty payments for specified types of cargo; (10) coastwise, uniform skill differentials, (11) longshore health insurance plan; (12) longshore pension plan; and (13) weekly or monthly guarantee of a minimum number of hours work opportunity for registered longshoremen.

On April 12, the WEA also served notice of intention to amend the longshore agreement, as well as the steam schooner supplement, but notified the Union that before it would consider the latter's proposals, it would insist upon conformance to the law.

Next day, the ILWU served notice reopening the ship clerks' agreements. In addition to its hiring hall demands which corresponded generally to those affecting longshoremen, the Union demanded paid vacations for all clerks, supervisors, and supercargoes, qualifying within a prescribed formula; reestablishment of a 10 per cent differential for clerks over basic longshore rates; uniform wages for clerks, and differentials of 10 and 20 per cent over the basic clerks' rate for supervisors, supercargoes, and chief clerks; and inclusion in the agreement of all classifications in the unit described in NLRB Case 20-R-1690.

The same day, the WEA served notice reopening

the master agreement, and the several port agreements for ship clerks and checkers, and advised that the appropriate port associations would communicate with the locals involved. Again, mention was made of the requirement for conformance to the law.

When the parties met on April 15, 1948, Bridges furnished the WEA representatives with the formal demands, adopted by the ILWU Coastwise Longshore Caucus comprising, in addition to those already made, demands for (1) increased subsistence, (2) travel time at straight time or overtime rates, whichever was applicable; (3) a 2-year contract terminating June 15, with semi-annual wage reviews; (4) elimination of existing disciplinary and penalty provisions, (5) additional penalty rates, (6) a day off each week, and (7) a provision that cessation of work by longshoremen, individually or in groups, should not constitute a violation of the contract. WEA President Foisie insisted that the issue of conformance to law would have to be settled before the employers could entertain the Union's demands. Bridges urged that the hiring hall issues be reserved for later discussion, particularly since the Union had submitted a counter-proposal on those issues, and that the Union's demands be discussed to see what progress could be made. The Employers refused.

Although there was some desultory discussion of the Union's demands in conferences within the next few days, principal discussion revolved about the

WEA's insistence on first settling the issue of conformance to law, and the ILWU's equal insistence on discussion of its demands before dealing with the hiring hall issues. Bridges reiterated a proposal to continue the existing hiring hall provisions, subject to renegotiation in the event of an adverse Supreme Court ruling, but the Employers maintained that this could be accomplished only by proceeding through the Board. An employer proposal that the parties solicit an opinion on the hiring hall issues from the General Counsel, or seek a determination by filing an unfair labor practice charge, was rejected by Bridges.

On April 27, the WEA formally notified the FMCS of the existence of certain disputes within the meaning of Section 8 (d) (3) of the Act, and invited its intervention.

Next day, the parties met briefly on the matter of the clerks and checkers contracts. As in the case of the longshoremen, the Employers maintained that the issues of conformance to law would have to be settled before they would entertain the Union's demands. A union proposal that the hiring hall issues with respect to these employees be negotiated on a coastwise basis, was rejected, the Employers insisting that these issues be dealt with in supplementary agreements on a port basis. The Employers also advised the Union that they would insist on the exclusion of supervisors and supercargoes from the checkers units. Finally, it was agreed to defer further negotiations respecting these employees until agreement was reached with the long-

shoremen, and that, in accordance with traditional practice, the checkers' agreements would be patterned on the coast longshore agreement. Later that day, the WEA wrote the Union that it had notified the FMCS and the State Mediation Services in California and Oregon of the existence of the labor disputes with the Union.

In a formal reply, on April 30, to the Union's letter reopening the checkers' contracts, the WEA reiterated its position on contract conformance, and, after suggesting the availability of the union authorization procedures of the Act, advised the Union that the parties could conclude no agreement which permitted discrimination against non-union employees. The Union's proposals, including the demand for inclusion of supervisors in the unit, were summarily rejected.

No further meetings were held until May 11, when, for the first time, the parties met under FMCS auspices. In all, some 15 meetings, 2 some days, were held with the Conciliators. The last of this series was held on August 6, 1948.⁴⁷ At the request of the Conciliators, both parties reduced their respective positions to writing. Stressing the necessity for conformance to law, which they regarded as the paramount issue, the Employers re-

⁴⁷The meeting of August 6, though for the purpose of negotiations, was devoted primarily to an attempt to enlist the Union's support in obtaining the release of a vessel of a WEA member, which had been confined at Coos Bay, Oregon, as a result of a labor dispute in which the Union had been respecting picket lines of another union.

iterated their earlier proposals for (1) elimination of preference of employment based on union membership, and the substitution of preference based on registration, without discrimination on account of union membership; (2) exclusive right of the employers to select men for registration, but with joint determination as to the number of men to be added to or removed from the registration list; (3) preference in registration to men previously employed in the industry, who had not been dropped for cause or reasons other than lack of employment, seniority to prevail in the event of reductions from the registration list; and (4) elimination of union selection of dispatchers, substituting selection by the FMCS or some other impartial authority. Turning to what they termed substantive changes, the WEA proposed (1) elimination of mid-term wage review; (2) elimination of restrictions on cargo handling consistent with safety; (3) stabilization of the industry through special cargo gangs, steady men and steady gangs; (4) guarantees against work stoppages, and restrictions on activities of union business agents; (5) denial of the use of the hiring hall to employers, not members of the WEA, except by prior mutual consent of the Employers and the Union; and (6) conformance of the working and dispatching rules in the several ports to the foregoing proposals.

The Union's position consisted of demands for retention of the existing provisions for preference of employment, establishment of the Port and Coast Labor Relations Committees, joint control, through

the Labor Relations Committee, of the hiring hall, registration, and the organization and dispatching of gangs; hourly wage differentials for certain skills, and alternative vacation plans, including establishment of a vacation fund to be administered by the Union, covering dock workers, checkers, and clerks, with modification of the formula determining eligibility for vacations.

On May 24, Cole Jackman advised the WEA that he had been designated as negotiator for the ILWU ship clerks locals, and requested early consummation of a master agreement. He noted, however that before agreements could be concluded on behalf of checkers, it would be necessary to conclude agreements with other maritime unions having contractual relations with the WEA. Foisie replied that this requirement manifested lack of good faith, and, in view of the Union's position on the issue of conformance, recommended that further negotiations be conducted under FMCS auspices.

On May 25, the WEA notified the FMCS and Director Cyrus S. Ching, personally, that negotiations had proved futile. Warning that a strike in the industry would not only jeopardize overseas supplies to the Armed Forces, and the Economic Cooperation Administration program, but also adversely affect the public welfare, Foisie summarized the state of negotiations. He contended that basic disagreement stemmed from the issue of conformance to the Act, and, while maintaining that the Union's demands had been rejected as illegal, restrictive, or economically unsound, and manifesting

an attempt to avoid responsibility for contract observance, stated that the Employers were, nevertheless, prepared to consider the Union's proposals further, if the objections to the hiring hall issues could be overcome.

On June 3, 1948, by Executive Order No. 9964, the President appointed a Board of Inquiry under Title II, Section 206 of the Act, to inquire into labor disputes in the maritime industry, including those here involved. Meetings were held on June 7 and 8, and, on June 11, 1948, that Board issued its report to the President. On June 14, the Attorney General obtained from the United States District Court for the Northern District of California (Civil No. 28123-H), a temporary restraining order enjoining the ILWU, and other unions, and the WEA, WEAC, WEOC, WEW, other named employer associations and their members, and named individual companies, from engaging in strikes or lock-outs in the maritime industry. On June 23, the temporary restraining order was continued to July 4. On July 2, a preliminary injunction was issued, enjoining strikes and lock-outs for a period of 80 days from June 14, the date of the original temporary restraining order. On August 14, after further hearing held on August 10, the Board of Inquiry submitted its final report to the President.

In the interim, the parties continued to meet with the FMCS Conciliators. On June 16, in response to an employer request for specific proposals, the ILWU made its first specific wage demand for an 18 cents an hour increase in the basic rate, retroactive to June 15, 1948, with a corresponding differ-

ential for ship clerks, and added differentials for supervisors, supercargoes, and chief clerks. On June 22, the ILWU submitted to the Conciliators a consolidated list of its demands for the longshore, steam schooner, and ship clerk employees, which was transmitted to the WEA. On June 28, the WEA furnished the Union with a summary of its proposals to date, reiterating those it regarded necessary to conform to the Act, but making no wage offer.

On August 10, during the hearings before the Board of Inquiry, the WEA, at the request of that Board, submitted its last offer of settlement, as provided in Title II, Section 209 of the Act. Regarding the longshore and steam schooner agreements, the WEA proposed an extension to September 30, 1949, subject to automatic renewal annually in the absence of 60 days' notice, and renewed its earlier hiring hall proposals. On the Union's economic demands, it proposed a 5-cent increase in the basic hourly rate, with corresponding increase in overtime rates; a 9-hour work shift; a day off each week; limitation on the total number of hours longshoremen might work; 5 cents an hour straight time, and corresponding overtime pay, in lieu of vacations and vacation pay; increase in subsistence rates; elimination of wage review; and revision of all port working and dispatching rules to conform to the contract as amended.

Separate offers, with appropriate variations, including wage differentials, corresponding to the "last offer" to longshoremen, were made simul-

taneously by the various regional associations to the respective ILWU locals representing the clerks and checkers in the respective port areas. The offers provided, however, for the exclusion of super-cargoes, supervisors, chief supervisors, and hatch watchmen, where involved, from the clerks' units. Copies of these offers were mailed to officers of the local unions, and summaries furnished some 15,000 ILWU members, by the Employers.⁴⁸

No further meetings were held until Saturday, August 28, when the parties met at afternoon and evening sessions lasting some 5 hours. WEA Attorney Harrison expressed urgency for reaching agreement before the following Monday, when a threatened railroad embargo on all shipments to the west coast affecting freight and passenger service was to become effective.

In a memorandum submitted at this conference, the Union, in effect, adopted the Employers' proposals regarding preference of employment based

⁴⁸After submission to the President, of the Board of Inquiry's Final Report, the NLRB, pursuant to Section 209(b) of the Act, conducted a "final offer" ballot, on August 30 and 31, 1948, among employees of members of the WEA, and other groups not directly involved in this proceeding, in each of 12 groups listed in the Report. The results as to these employees, certified by the NLRB Executive Secretary on September 1, revealed:

Number of eligible employees (in all 12 groups)	26,965
Ballots marked "Yes".....	0
Ballots marked "No".....	0
Ballots challenged.....	0
Total ballots cast.....	0

on registration, and preference as to new additions to the registration list based on former employment, subject to qualifications already mentioned, but added two further qualifications. The first would deny registration to former longshoremen whose reemployment "would create unsafe conditions on the job or constitute a source of friction among the employees." The second would permit employees, individually or as groups, to refuse, without causing a breach of the contract, to work with men whose continued employment they regarded "dangerous or otherwise detrimental to safe and harmonious working conditions and relationships." Additions to or deletions from the registration list were to be without discrimination on account of union affiliation, race, creed, color, religious or political beliefs. The Union's economic demands remained substantially unchanged, and contemplated a contract to expire June 15, 1950, with provision for existing semi-annual wage review. Regarding ship clerks, the Union renewed its demands, including a coastwise agreement containing all existing provisions in the port supplements which were uniform or substantially identical. Finally, it was proposed that all other longshore and clerks' demands be subject to further negotiation, and arbitration, if necessary.

In its written proposal of August 28, the Employers offered to accept the Union's proposal of March 24, 1948, with respect to the hiring hall. This, it will be recalled, provided for (1) continuance of the existing provisions regarding selection of dispatchers, subject to renegotiation in the event

of a "legally binding decision of any court" invalidating those provisions; (2) preference of employment based on registration; (3) preference in additional registrations to persons formerly employed as registered longshoremen; (4) reduction of the number of men on the registration list, when required, on the basis of seniority; and (5) equalization of work opportunity. In addition, the Employers offered to eliminate the provisions dealing with discipline of members by the Union, but reserving to the Labor Relations Committee the power to discipline individual longshoremen. Further proposals included an offer to continue existing unit coverage, except for supercargoes; renewal of existing vacation plans, or, in the alternative vacation pay equivalent to 5 cents an hour straight time, and $7\frac{1}{2}$ cents overtime for each pay roll hour of employment; a 9-hour shift, with certain qualifications; an increase in the basic longshore rate of cents an hour straight time, and 12 cents overtime; a day off each week; continuance of the existing grievance machinery and arbitration; denial of the use of the hiring hall, except with the consent of the Associations, to non-member employers; and reasonable restrictions on activities of union business agents. With the foregoing amendments, the Employers offered to renew the existing contract until June 15, 1950, subject to one reopening on 60 days' notice prior to June 15, 1949, as to wages only, with the right to cancel on that date if no agreement was reached on that subject. The proposal was rejected. Reminded that the hiring

hall proposals were substantially those proposed early in the negotiations by the Union, Bridges, referring to intervening events since that proposal, including the issuance of the injunction, and the unfair labor practice complaint, observed that "the men" were in a "different frame of mind."

The parties met again next day, Sunday, August 29, and daily thereafter until the night of September 1, adjourning to hold separate caucuses, to draft further proposals and counterproposals, and returning to resume negotiations. Among other things, Bridges objected to the language in the proposed savings clause which provided for renegotiation in the event of an adverse decision by "any court" rather than a "final court." Other disputed issues involved the scope of the Impartial Chairman's authority under the contract; overtime compensation under the Fair Labor Standards Act; the right of longshoremen to elect whether to work with men whose presence they believed might create "inharmonious" conditions, or jeopardize the safety of others; and elimination from the contract of unspecified "obsolete awards."

During this period, the Union reduced its basic wage demands to 16½ cents an hour, and, later to 13 cents for straight time, with corresponding overtime rates, retroactive to June 15, 1948, on a contract to expire June 15, 1950, subject to existing provisions for wage review. The Employers increased their offer to 10 cents an hour straight time, plus overtime. Pressing for its more basic demands, the Union proposed that such issues as vacations,

statutory overtime, arbitration, elimination of obsolete awards, and other fringe issues, be deferred for further study and negotiation.

On August 30, as appears from its written proposal, the Union's position on the hiring hall issues appeared to have changed. It now proposed that the provisions dealing with the hiring hall, registration, and preference of employment be continued as in the expired contract, with the proviso that, in the event those clauses were "suspended in any way as a result of legal action," the agreement should terminate without notice. Further, if, prior to termination of the agreement, any employee or employer covered by the agreement undertook "by legal action" to change or eliminate the hiring provisions, refusal by employees to work with such employee or for such employer, was not to constitute a violation of the agreement. Next day, the Union, elaborating its position, proposed that the Employers furnish it with a "covering letter" stating that, "if hiring, dispatching and preference provisions are suspended in any way as a result of legal action or injunction proceedings, whether or not such proceedings are initiated by the employers," the agreement should terminate, without notice. Although the Employers finally acceded to the Union's hiring hall proposal, subject to the savings clause, they insisted that such provision be included in any contract reached between the parties. The Union refused, insisting that the proviso be covered in a separate letter. Both parties were equally adamant on this issue, and, although

other issues still remained unresolved, it is apparent that negotiations began to founder on this reef.

Concerned at the approaching "deadline," and the prospect of a strike if no agreement were reached, the Employers pressed for a definite commitment as to the duration of the impending "stop-work meeting," scheduled the morning of September 2, for the purpose, according to Bridges, of apprising the union members of the state of negotiations, and conducting a referendum on any proposed contract. The Union replied by letter that if its Coast Negotiating Committee could submit an acceptable contract to the membership, no strike would occur, and work would be resumed without waiting to complete details of ratification.

At a meeting on the afternoon of September 1, the Employers submitted a complete draft of agreement, embodying their final offer. The proposed agreement consisted of a tentative master contract between the ILWU, on behalf of itself and the locals involved, on the one hand, and the WEA, on behalf of itself, the WEAC, WEOC, and WEW, and their respective members, on the other, subject to ratification by the respective memberships of the parties. It provided for (1) immediate execution of the Coast Longshore Agreement, a copy of which was attached; (2) renewal without change of the steam schooner supplement for a term coextensive with the longshore agreement; and (3) renewal without change, except in stated respects, for a term of 1 year from June 15, 1948,

of the master agreement, dated June 16, 1947, as well as the port supplements covering ship clerks.⁴⁹ Among other provisions, the proposed master contract included a basic wage increase of 10 cents an hour straight time, and 15 cents overtime; a wage review on December 15, 1948, at the request of either party on 30 days' notice, with arbitration in the event of disagreement; 2 weeks vacation, with pay equivalent to 5 cents for each hour of straight time, and 7½ cents overtime, worked during the preceding calendar year; permission to business agents or qualified representatives of the Union to visit the employer's dock or vessel; and termination of all agreements simultaneously in the event of termination of the Coast Longshore Agreement.

The proposed Coast Longshore Agreement, incorporating by reference the 1934 Award, as amended from time to time, provided for a terminal date of June 15, 1949, subject to automatic renewal annually in the absence of 60 days' notice. In addition to the basic wage increase established in the master contract, the longshore agreement provided for differentials for penalty cargoes, and for varying skills; subsistence rates for lodging and meals; a vacation plan based on that in the master agree-

⁴⁹Also provided for was renewal, for the same term, of agreements covering carloaders, sweepers, dockworkers, and other categories of employees, not directly involved in these proceedings, for whom the ILWU bargained with the Associations, and executed contracts, generally following the pattern established in the Coast Longshore negotiations.

ment. A 9-hour shift, with certain qualifications, exclusive of travel time; a 40-hour week, with limitation on the total number of hours longshoremen might work in a specified period; a stated day off each week; and provision for renegotiation of overtime provisions in the event of amendment to the Fair Labor Standards Act, other legislation, or Supreme Court Decision, were also included.

With respect to the selection of hiring hall personnel, including the dispatcher, hiring and dispatching of longshoremen, preference of employment to union members, and establishment of the Coast, and Port Labor Relations Committees, the contract retained the identical provisions of the contract recently terminated.⁵⁰ A further provision, however, was added, denying the use of the hiring hall to employers who were not members of the WEA, except with its written consent.

Deferring to the Union's request, the designation, Coast Arbitrator, was substituted for that of Impartial Chairman, wherever it appeared in the former contract, and his duties, and those of Port Arbitrators, were specifically limited to issues involving interpretation of the agreement, or disputes thereunder, in contrast to the provisions in the expired agreement, which had authorized them to determine "any other questions of mutual concern not covered by this contract and relating to the industry."

⁵⁰For the actual language of these provisions, see Sections 4, 5, 6, 8, 9, and 10, quoted earlier at pp. 24, 25, and 26 corresponding to similarly numbered sections in the contract under consideration.

The provisions requiring the ILWU to enforce discipline of members for infraction of rules, misconduct or work stoppages, were deleted, responsibility therefor being reserved to the Port Labor Relations Committee. Retained, however, were provisions for union discipline of gang members who failed to report without sufficient notice to permit replacements by the Union.

Finally, it was provided:

Section 15. If registration, hiring, dispatching or preference provisions of this agreement are suspended in any way as a result of legal action or injunction proceedings, whether or not such proceedings are initiated by the employers, this agreement shall terminate and it is understood and agreed by the parties that notices concerning such termination of the agreement are waived.

Disagreement arose between Bridges and Harrison, as to when the contract would become effective, Bridges maintaining that it would require ratification by the respective memberships of the parties, first, Harrison contending that it would become effective immediately upon execution. After some desultory discussion of the provisions, on some of which there appeared to be an area of agreement, Bridges reminded the Employers that the parties could conclude no agreement, in any event, unless agreements were also achieved with the other maritime unions.⁵¹ Attorney Harrison remarked that he

⁵¹Reference was to National Union of Marine Cooks and Stewards, and Marine Engineers' Bene-

understood that to be so. At about 6 p.m., the Meeting adjourned until later that evening.

At 8 o'clock, September 1, the parties reconvened for the third time that day. Referring to the impending "stop-work meeting" and the approaching deadline, Harrison announced that he understood that if agreement were not reached by midnight, a strike would take place. Bridges insisted that the deadline was not until 10:30 the following morning, obviously referring to the expiration of the 80-day injunction. Observing that he did not consider the time consumed before the recess profitably spent, Harrison suggested the parties confine themselves to the vital issues. Bridges pointed out that the parties were still in disagreement as to the method of dealing with the "savings clause," in connection with the hiring hall provisions. This issue, Bridges stated, as well as the Union's demand for a 15 cents an hour basic increase, a 9-hour work shift, Sundays off, and the settlement of overtime provisions under the Fair Labor Standards Act, constituted "strike issues." Other issues, such as those dealing with vacations, the selection of an arbitrator, and elimination of "obsolete awards" from the contract, he stated, could be deferred.

Harrison observed that, since the other maritime unions were not meeting in bargaining conferences that night, there was no apparent likelihood that

ficial Association, both affiliated with the CIO, and Marine Firemen, Oilers, Watertenders & Wipers Association, Independent.

the parties here could reach agreement by midnight. The employer representatives retired briefly to caucus. Returning soon afterward, they announced the Employers' offer would remain open until midnight. When Bridges told them the offer was rejected, Harrison formally withdrew the offer, remarking, "We will see you later." Bridges retorted, "We will see you on the picket line," and the meeting ended.⁵²

H. The Strike; subsequent events

At midnight, September 1, 1948, all longshore work on the Pacific coast waterfront ceased. Next morning, the Union held its stop-work meetings, and soon afterward, the strike began, with pickets patrolling the docks of the Embarcadero. Except as hereinafter noted, commercial shipping on the west coast, during the 97 days of the strike, was practically at a standstill. Although ship stores, mail, and baggage from arriving passenger vessels was discharged, and some work was performed by two independent stevedoring companies, not members of the Association, no commercial longshoring

⁵²The findings in this section are based primarily on the credible and uncontradicted testimony of WEA Vice-President and General Manager Henry W. Clark, and to a lesser extent on that of WEAC Manager F. C. Gregory, corroborated substantially by minutes of various bargaining conferences, exchanges of memoranda, various proposals, and drafts of agreements in evidence. Testimony of Research Director Lincoln Fairley, the only witness called by the Respondents, although differing somewhat in emphasis, was not in substantial conflict with the testimony of Clark and Gregory.

was performed during the strike. As will presently appear, beginning about September 15, longshore work in connection with shipment of military cargo was performed by longshoremen, hired by the United States Army, as civilian employees under Civil Service regulations.

On September 2, the WEA and the Pacific American Shipowners Association, commonly referred to as PASA, notified the ILWU by letter, simultaneously released to the press, of a resolution, unanimously adopted by the members of both Associations, to refuse to bargain with any labor organization which failed to comply with the non-Communist affidavit provisions of the Act.⁵³ This statement of policy was later implemented by an announcement that the Employers would refuse to deal with "irresponsible union leaders," an obvious reference to Bridges and other union representatives.

On September 10, the ILWU replied by letter, also released to the press, advising that as a result of a secret referendum on the question of compliance with the non-Communist affidavit provisions of the Act, and the Employers' last contract proposal, which the Union asserted the Employers had mailed directly to the union members, despite the claim that the offer had been withdrawn, an overwhelming majority of the union members voted against both propositions. A purported tally of the ballots on each question, segregated as to job classi-

⁵³The language was substantially that appearing in Section 9 (h) of the Act.

fications, was furnished. The letter invited the Employers to resume negotiations, expressing willingness to "start from scratch," or continue from where they had left off the eve of the strike.

On October 16, Bridges again wrote the WEA, reiterating proposals allegedly made, in his capacity as ILWU president, over the radio and in newspaper advertisements, for the selection by secret ballot of a union negotiating committee composed exclusively of striking employees.

In his reply, WEA President Foisie stated that the composition of the negotiating committee was not "the key to our present impasse." He charged, "Your fourteen year party line record of irresponsibility and double-dealing proves that any contract which you and your leadership are ultimately to administer, no matter how or with whom negotiated, is worthless. The problem, as you well know, is the future administration and observance of any contract between ourselves and the ILWU, under its present leadership."

Construing Foisie's letter as a flat rejection of the Union's offer to negotiate a settlement of the strike, Bridges replied, accusing the Employers of attempting to foster establishment of a company-dominated union such as, he claimed, had been in operation prior to 1934, and reiterated the Union's determination to prevent a return to that era.

1. Army cargo

For some years prior to September 2, 1948, contractual relationships had existed between the

United States Army and various steamship, stevedore, and terminal companies for the transport of Army cargo. Agreements between the Army and the companies provided that these so-called contractors submit bids for the transport of such cargo as the Army might "tender" them. Provisions regarding wages, hours, and conditions of employment of longshoremen or clerks employed by the contracting companies were not covered by these agreements, but were left to collective bargaining between the employer associations and the unions. The Army's primary concern has been that the cargo should be transported to its overseas installations. On September 2, some 30,000 tons of mixed general cargo, destined for its overseas installations in Hawaii, Japan, and Guam, was ready and available for shipment.

Several days earlier, the Army learned, through channels as well as through its contractors, of the impending strike. When longshoremen failed to report for work on September 2, Lt. Colonel Sydney F. Hyde, Superintendent of the Water Division, Transportation Corps, at the San Francisco Port of Embarkation, notified the office of the Chief of Transportation in Washington. September 2nd occurred on a Thursday; Labor Day the following Monday. On Tuesday, September 7, Colonel Hyde communicated by telephone, and later by letter, with the individual contractors, both shoreside and marine, to ascertain whether if, despite the strike, the ILWU and the other marine unions agreed to handle Army cargo, the contractors would agree

to perform under their contracts. Each of the contractors replied that they would be unable to do so because of the existing labor dispute with the ILWU and the other unions involved.

Next day, at the request of ILWU President Bridges, a conference was held at the office of Major General Lester, commanding officer of the San Francisco port, at Fort Mason, to explore ways of exempting Army cargo from the strike. In addition to Major General Lester and other Army officers, Bridges, Bulcke, and representatives of the MEBA, the Firemen, and the Marine Cooks and Stewards, were present. Various proposals were made by Bridges and the representatives of other unions at the conference.

After reporting the results of this conference to Washington, the Army representatives notified its five stevedore contractors by letter of the ILWU offer to exempt Army cargo from the strike, and called upon them to perform under their contracts. Notifying its five steamship contractors to the same effect, the Army formally offered each a full shipload of dry cargo to be berthed on September 15, and a full refrigerator cargo to be berthed on or before September 16. On about September 11 or 12, Marine Firemen President Vincent Malone telephoned Colonel Hyde that all marine unions, except the MEBA, which had reached tentative agreement prior to the strike, calling for a 5.3 per cent increase, had acquiesced in the ILWU's offer to exempt all full loads of Army cargo from the strike under the terms proposed by Bridges.

By substantially uniform letters, dated September 13, all the steamship and stevedore contractors replied that they would be unable to perform under their respective contracts because of the existence of the strike. With the exception of one stevedore contractor, whose work was confined to Army passenger ships, and who performed under his contract until September 18, no contractors loaded or discharged Army cargo vessels until September 16.

Beginning on September 14, the Army began hiring longshoremen and dockside workers as Civil Service employees through the Army personnel office at Fort Mason. On the afternoon of September 15, the Army reopened its employment office at the Oakland Army base. Between September 14 and September 18, a total of about 300 longshore and clerical employees were hired at both bases. On September 18, the Army, through its Port Commander, executed a contract with the Mutual Stevedore Company, an independent company, which began moving cargo on the morning of September 21, with longshoremen and ship clerks obtained from the ILWU and the Ship Clerks Union.

Beginning on September 14, when the Army first began direct hiring of longshoremen and clerks as Civil Service employees, and until September 20, pickets appeared at Fort Mason. There is no direct evidence that these pickets were members of the ILWU or any of its affiliated unions; nor that they were directed or authorized by the Union or its affiliates to engage in picketing during the period in question, and at the place indicated.

The General Counsel's contentions that the picketing at Fort Mason was in protest at the Army's hiring of dockside employees through its own facilities, rather than through the hiring hall, and that this evidence substantiates the position that the strike was called to enforce the ILWU's demand for continuance of the existing hiring halls and practices, are discussed below.

1. Events after the close of the original hearing; execution of new collective bargaining agreements.

The original hearing in these cases closed on October 28, 1948, while the strike was still in progress.⁵⁴ Events occurring thereafter led to the reopening of the record, and resumption of the hearing on April 20, 1949.

As alleged in the amendment to the complaint, and established principally by stipulation of the parties, and pertinent exhibits received in evidence, the facts disclosed the following:

On about November 25, representatives of the ILWU and the WEA reached agreement, in principle, on the Coast Longshore and Ship Clerks Contracts. Beginning about December 2 or 3, picketing diminished, and, by December 6, pickets were wholly

⁵⁴Hearing in the Matter of National Union of Marine Cooks and Stewards, CIO, and Pacific American Shipowners Association, Case No. 20-CB-20, the companion case, involving substantially the same hiring hall issues, was commenced on November 1, 1948, and closed, initially, on November 12, 1948.

withdrawn, and the longshoremen and ship clerks returned to work. The strike was finally settled on December 6, 1948.

The Coast Longshore Contract between the WEA and the ILWU was dated December 6, 1948; the Ship Clerks Contract, January 17, 1949. A Port Supplement to the Ship Clerks Contract, between the WEAC and the Marine Clerks Association, Local 1-63, covering the Los Angeles-Long Beach area, was executed March 11, 1949; a Port Supplement, and Working Rules, between the WEOC and ILWU Checkers and Supercargoes Local 40, covering checkers, supervisors, and supercargoes at Portland, Oregon, on March 25, 1949. As of the date of the close of the hearing on April 21, 1949, no Port Supplement covering ship clerks in the Port of San Francisco, had been executed.

Since December 6, 1948, according to the stipulation, and registration, hiring, and dispatching procedures, and the practices thereunder, have been substantially the same as those which had existed prior to September 2, 1948.

1. The outstanding contracts

- a. The Coast Longshore Agreement

Execution of the basic Coast Longshore Agreement was accomplished by letter, dated December 17, 1948, addressed by the WEA to the ILWU, acknowledging that agreement had been reached on all portions of the agreement, except as to steam schooners, completion of which was anticipated

within a week. The letter advised that a complete draft of the longshore agreement was being prepared, copies of which would be furnished as soon as possible, and requested that the Union acknowledge the letter. In complying, Bridges and two other union representatives affixed their signatures to this letter on behalf of the ILWU.

The agreement itself, dated December 6, 1948, between the WEA, WEAC, WEOC, WEW, designated as the Employers, on behalf of their respective members, and the ILWU, was for a term from December 6, 1948, to and including June 15, 1951, subject to automatic annual renewal in the absence of 60 days' written notice, or unless terminated in accordance with other provisions in the agreement, or extended by mutual agreement. After defining longshore work, and the job classifications covered by the agreement, the contract provided for a basic hourly wage increase of 15 cents, with corresponding overtime rates, skill differentials, and penalty cargo rates, straight and overtime hours of work, minimum reporting pay, maximum work shifts, equalization of work opportunity and earnings, travel pay, subsistence, scheduled days off, holidays, sling load limits, safety provisions, grievance procedure, and numerous other subjects of collective bargaining. A wage review of basic straight and overtime rates, and negotiation of welfare and pension plans, at the request of either party, on September 30, 1949, and September 30, 1950, were also included with provision for arbitration by the

Coast Arbitrator, in the event of disagreement, on the wage issue only.

With respect to hiring, registration, and preference of employment, the agreement provided:

Section 7. Hiring Hall, Registration and Preference

(a) Hiring Hall

(1) The hiring of all longshoremen shall be through halls maintained and operated jointly by the [ILWU] and the respective Employer Associations. The hiring and dispatching of all longshoremen shall be through one central hiring hall in each of the ports, with such branch halls as shall be mutually agreed upon in accord with provision of Section 14 (c). All expense of the dispatching halls shall be borne one-half by the [ILWU] and one-half by the Employers.

(2) Each longshoreman registered at any hiring hall who is not a member of the [ILWU] shall pay to the Union toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the Union.

(3) Non-Association employers shall be permitted to use the hiring hall only if they pay to the Association for the support of the hiring hall the equivalent of the dues and assessments paid by Association members. Such non-member employer shall have no preference in the allocation of men, but when there are not sufficient men available to

handle all the needs of the port shall be allocated men on the same basis as men are allocated to Association members.

(b) Hiring Hall Personnel

(1) The personnel for each hiring hall, with the exception of Dispatchers, shall be determined and appointed by the Labor Relations Committee of the port. Dispatchers shall be selected by the Union through elections in which all candidates shall qualify according to standards prescribed and measured by the Labor Relations Committee of the port. If they fail to agree on the appropriate standards or on whether a candidate is qualified under the standards, the dispute shall be decided in accord with provisions of Section 14 (a). The standards for Dispatchers shall be uniform among the several ports insofar as possible.

(2) All Dispatchers hereafter elected shall be permitted to hold office for the duration of this agreement, excepting only in those ports where dispatching is done on a part-time basis by a person holding union office and acting in a dual capacity.

Neither the constitution nor any rule of the Union or any of its locals shall abridge the foregoing provision.

(3) All personnel of the Hiring Hall, including Dispatchers, shall be governed by rules and regulations agreed upon by the Port Labor Relations

Committee, and shall be removable for cause by the Port Labor Relations Committee.

(4) The employer, when desired, shall be permitted to maintain a representative in the Hiring Hall at all times.

(c) Registration

(1) The Port Labor Relations Committee in any port shall have control over registration lists in that port, including the power to make additions to or subtractions from the registration lists as may be necessary.

(2) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail.

(3) Longshoremen not on the registration list shall not be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work.

(d) Preference

Preference of employment shall be given to members of the [ILWU] whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. This section shall not deprive the Employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.

Section 14. Grievance Machinery

(c) Labor Relations Committees

(1) The parties shall immediately establish, and shall maintain during the life of this agreement, a Port Labor Relations Committee for each port affected by this agreement, an Area Labor Relations Committee for each of the four port areas (Southern California, Northern California, Columbia River and Oregon Coast Ports, and Washington), and a Coast Labor Relations Committee at San Francisco, California, each of said labor relations committees to be comprised of three representatives designated by the Union and three representatives designated by the Employers. By mutual consent any labor relations committee may change the number of representatives of the respective parties.

(2) Subject to provisions of Section 14 (a)⁵⁵ the duties of the Port Labor Relations Committees shall be:

- A. To maintain and operate the hiring hall.
- B. To have control of the registration lists of the port, as specified in Section 7 (c).
- C. To decide questions regarding rotation of gangs and extra men.
- D. To investigate and adjudicate all grievances and disputes according to the procedure outlined in Section 14 (a).

Annexed to, and denominated as an addendum to the Coast Longshore Agreement was the following:

⁵⁵Grievance machinery.

If registration, hiring, dispatching or preference provisions of this agreement are suspended in any way as a result of legal action or injunction proceedings, then such provisions shall be opened for negotiations for substitute provisions complying with the law, and the substitute provision hereinafter set forth shall apply for the period of negotiations:

- a. Working preference to registered men.
- b. In making additions to the registered list preference shall be given to men with previous registration in the industry and who were not dropped from the list for cause.
- c. In reducing the number of men registered in keeping with the requirements of the industry men last registered shall be first removed.
- d. Non-union men being dispatched through the hiring hall shall pay to the union an equal share of the cost of maintenance of the hiring hall and the procurement, administration, and enforcement of the contract, which sum shall not exceed that being then currently paid by members of the union in the form of dues and general assessments. Such non-union men shall be liable for said amounts only prospectively from and after the date this provision becomes effective, and only while such provision is effective.

Negotiations shall be carried on for a period of 120 days or until agreement is reached whichever is sooner. If agreement is not reached by the end of the 120 day period the above substitute provisions shall continue in effect.

In the event that any outside authority acts to nullify in whole or in part the above substitute provisions if invoked or any substitute provisions which may have been agreed to in negotiations the parties agree to resist such action. If nevertheless the provisions are nullified in whole or in part there shall be further negotiations for a period of not less than 120 days in an effort to agree upon new substitute provisions which comply with the law. In the event no agreement is reached within the 120 day period or in the event any agreement which may be reached is nullified in whole or in part either party hereto may cancel this agreement upon 5 days' written notice.

e. In the event the above substitute provisions are invoked as herein provided the first two paragraphs of subsection (f) of Section 14 of the agreement may be renegotiated and the third paragraph thereof shall be amended by adding thereto the following:

"It is also understood that either party may cite before the Labor Relations Committee any union or non-union longshoreman whose conduct on the job or in the hiring hall causes disruption of normal harmony in the relationship of the parties hereto and by action of the joint committee longshoremen found guilty of such conduct may be suspended or dropped from the registration list. The standards of conduct imposed hereunder shall be the same for all longshoremen."

b. The clerks and checkers contracts

As in the case of the Coast Longshore Agreement, execution of a master agreement covering ship clerks and checkers between the ILWU, acting on behalf of Marine Clerks Association Local 1-63, Ship Clerks Association Local 34, Supercargo and Checkers Union Local 40, and ILWU Local 46, and the WEA, on behalf of the WEAC and WEOC, assumed the form of a letter, dated January 17, 1949, confirming tentative agreement on all portions of the master agreement, excepting port supplemental rules, while the parties agreed to attempt to complete by February 15, 1949. The letter was signed on behalf of the Unions by members of the Ship Clerks Committee for the ILWU, and, on behalf of the WEA by F. C. Gregory and other WEA representatives. The agreement provided that, as supplemented by the port agreements, it should constitute the collective bargaining agreement between the parties, covering clerks and checkers employed by members of the Employer Associations in the Oregon-Columbia River, San Francisco Bay, Hueneme, Los Angeles-Long Beach Harbor and San Diego ports, excluding executives, as defined in port supplements. The delineation of job classifications was reserved for the port supplements. The term of the agreement, and provisions for wage review coincided with those in the Coast Longshore Agreement.

On March 11, 1949, the WEAC and the Marine Clerks Association Local 1-63, executed a port supplement relating to the Los Angeles-Long Beach

Harbor area, covering ship clerks, supervisors, and supercargoes.

Another port supplement, together with working and dispatching rules, was executed on March 25, 1949, effective March 28, 1949, between the WEOC and Supercargoes and Checkers ILWU, Local 40, covering hourly and monthly checkers, supervisors and supercargoes in the Oregon and Columbia River area.

With respect to hiring, registration, and preference of employment, the master agreement covering ship clerks and checkers contained substantially the same provisions, with appropriate modifications, as those in the coast longshore agreement. The port supplements, wherever executed, generally incorporated these provisions by reference, and, in the case of the Oregon and Columbia River supplement, elaborated the provisions regarding selection and registration of men.

Upon the basis of all the foregoing facts, the General Counsel alleges that the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A), 8 (b) (2), and 8 (b) (3), and Section 2 (6) and (7) of the Act.

J. Issues; contentions; conclusions

It is apparent that from the outset of the preliminary negotiations, one of the principal obstacles to solution of the hiring hall problem was the Union's evident conviction, broadly hinted by Bridges during the discussions, that the Employers, while insisting that their position was dictated by

the necessity for conformance to the Act, were actually bent on depriving the Union of its hard-won gains, achieved after a long and bitter struggle culminating in the 1934 strike. During the bargaining conferences, as well as in the Union's formal demands, Bridges repeatedly warned that the Union would oppose any return to the conditions which had prevailed prior to 1934. This was apparently equated by the Employers and, at the hearing, by the General Counsel, as an adamant refusal to enter into any agreement which did not include the hiring hall provisions of the 1947 contract. It is clear, however, that the conditions to which Bridges referred were the graft, favoritism, company unions, blacklisting, and indignities to which employees had been subjected during that era. These conditions have been the subject of long and painstaking studies by governmental and private agencies, generally arriving at the same conclusion—that "decasualization" of employees in the industry is an urgent necessity.⁵⁶

⁵⁶See, e.g., Report of The Maritime Labor Board to the President and to the Congress, March 1, 1940, received in evidence in the instant case, as well as in the NMU case, cited elsewhere. Other literature on the subject, offered by the Respondents and excluded, has been filed with the rejected exhibits. The term "decasualization" frequently appearing in the literature issued to denote various methods of registration and dispatching of longshore or other maritime employees as a means of dealing with the problem of uncertainty and irregularity in employment. The term connotes the antithesis of the "shape-up."

Indisputably, the 1934 award, which introduced the principles of the joint hiring hall, registration, rotary hiring, equalization of work opportunity, limitation of sling loads, safety rules, and other salutary conditions of employment, had gone far toward ameliorating conditions in an admittedly hazardous industry, affording longshoremen a precarious livelihood. Viewed in this context, Bridges' statement assumes proper significance. His rejection of any proposal which he regarded as a "roof over the shape-up," anathema to longshoremen, can be readily understood. The Union's cynicism toward the Employers' concern for conformance to the law is, also, not surprising when regarded in the light of the Employers' obvious efforts to utilize the Act as a means of regaining exclusive control of hiring, registration, and dispatching of longshoremen.

These considerations, however, as both the Board, and the Court, have pointed out in the NMU case, in disposing of union arguments directed to the economic necessity for hiring halls in the maritime industry, "touch upon the wisdom of the legislation," and cannot affect the Board's determination of the issues.⁵⁷ Furthermore, in the face of the

⁵⁷Matter of National Maritime Union of America, C.I.O., et al., 78 N.L.R.B. 971, 978-979, enf'd 175 F. 2d 686 (C.A. 2). Nor, as the Board said in a later case, may it "engraft exceptions upon the congressional enactment because this now unlawful practice was sanctioned by custom in this particular [building construction] industry before 1947, or may be thought economically desirable or necessary." Matter of Daniel Hamm Drayage Company, Inc., 84 N.L.R.B., No. 56.

legislative history, it would be presumptuous to assume, as the Union suggests, that Congress has failed to give adequate consideration to the economic and other problems involved in the hiring hall in the maritime industry. Any possibility that Congress may not have intended to encompass within the ban on the closed shop the joint hiring halls as they have existed on the west coast, is dispelled by the statement of Senator Taft, appearing in the legislative history.⁵⁸ The hiring hall issues must, therefore, be resolved in terms of the allegations of the complaint within the framework of the Act.

Broadly stated, the General Counsel contends that the Board's decision in the NMU case, since affirmed by the Court, is dispositive of the issues in this case. He maintains that the mere fact that the hiring hall considered, there was under the exclusive control of the union is immaterial to the ultimate conclusion. The Respondents, on the other hand, contend that the provision, here, for joint control of the hiring hall by the Employers and the Union, through the Labor Relations Commit-

⁵⁸In presenting the Senate Bill, Senator Taft said, in part:

"In the first place, Mr. President, the bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. Cong. Rec., Senate, April 23, 1947, p. 3952.) (Emphasis supplied.)

Cf. also, remarks of Representative Havenner in the House, (Cong. Rec., House, April 16, 1947, pp. 3590-3591).

tee, sufficiently differentiates the two cases as to render the N.M.U. decision inapplicable. Whether the hiring hall as conducted and administered on the west coast is incompatible with the provisions of Section 8 (b) (2) and 8 (a) (3), need not turn on this narrow distinction. The Act renders it equally unlawful for an employer to discriminate, as for a labor organization to cause or attempt to cause an employer to discriminate, with regard to employment on the basis of union membership. The fact that an employer may acquiesce or participate in the discrimination renders the discrimination no less unlawful, but, on the contrary, results in a correlative violation on the part of the employer.⁵⁹

1. The alleged violation of Section 8 (b) (2)

The controversial provisions, which have been generally referred to as the hiring hall provisions, comprise the following separate, but integral, features:—the joint hiring hall, registration, selection of dispatchers by the Union, and preference of employment to union members.

⁵⁹Thus, e.g., it has been held that, where an employer entered into a closed-shop contract with a union, permissible under certain conditions, before the amendment of the Act, with knowledge that the union intended to use the closed-shop provisions as a means of reprisal against employees who had engaged in activities on behalf of a rival union, the employer violated Section 8 (3) of the former Act. *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248.

a. The hiring hall

It is not contended that the maintenance of a hall as a medium for recruitment, hiring, and dispatching of employees is *per se* illegal.⁶⁰ The Employers, themselves, recognize the obvious advantages of such a system, asserted repeatedly in the negotiations, as they have at the hearing, that they have no desire to abolish the hiring hall itself. What they have insisted on, however, is the exclusive right to hire and dispatch employees without regard to union membership. Presumably, this would encompass the right of applicants for employment to use the hiring hall without restriction. The 1947 hiring hall provisions, it will be recalled, permitted non-union applicants to use the facilities of the hiring hall by paying their pro rata share of the operating expense. Assuming, but without passing on, the propriety of requiring such applicants to contribute to the cost of maintaining the hall, this provision does not establish that the hiring hall was available to non-union, as well as union members, on a non-discriminatory basis. On the contrary, the evidence conclusively establishes that such persons could be dispatched only after all

⁶⁰This was, in effect, conceded by Senator Taft, when he stated:

"If in a few rare cases the employer wants to use the union as an employment agency, he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the men recommended by the union." (Cong. Rec., April 23, 1947, p. 3952.)

union members had been assigned. It is, however, obvious, that since the only discrimination in employment which the Act proscribes is that based on union membership, an arrangement whereby an employer undertakes to hire employees through a hiring hall exclusively, without regard to union membership, does not conflict with the provisions of the Act. The undersigned is not considering, for the moment, the question of the operation and administration of the hiring hall in actual practice, but merely that of the hiring hall itself as a medium of "decasualization."

b. Registration

The registration plan in effect during the period in question had its origin in the initial registration of longshoremen after the 1934 award. Eligibility for registration was then determined solely by previous employment in the industry for a stated length of time over a given period prior to the award. The manner in which additions to the registration list have since been made under the applicable provisions of the contract, has been discussed earlier. From this it is apparent that, although the union members of the Labor Relations Committee possessed the right to veto employer nominations for additions to the list, the applicable provisions did not expressly require or permit preference in registration based on union membership.

The provision for joint participation in decisions relating to registration appears to be neither unreasonable nor unlawful. Cogent reasons, presumably

recognized by the Employers in the past, exist for the participation by the Union in such determinations. The hazardous nature of the occupation, in which the lives and safety of longshoremen, working individually or in gangs, frequently depend on the skill, experience, and care of their fellow-employees, is only one of the considerations which renders selection of these men a matter of vital concern to longshoremen and their bargaining representatives. It is only necessary to observe, however, that such provision is not incompatible with the Act, so long as it does not by its terms or in its performance involve or contemplate discrimination based on union membership. That exercise of the veto by union members on the Committee has inevitably benefitted members of the Union by reducing competition for available jobs, cannot be disputed. Nor, that applicants for registration, i.e., employment opportunity, have been unable to acquire status as registered longshoremen, except with the mutual consent of the employer and union members of the Committee, or resort by representatives of either side to arbitration. So long as consent to the addition of longshoremen to the roster has been withheld for reasons other than union membership, the Act has not been violated. Nor does the curtailment, by agreement, of the Employers' right to select employees from any source other than the registration list render the provision unlawful under the Act. The law imposes no obligation upon an employer to hire any person who applies for employment, provided, of course, such employment

is not refused because of union considerations. By the same token, an employer may, without contravening the Act, agree with the recognized bargaining agent to confine his selection of employees to a registration list previously compiled by the parties, or to make his selection on any other basis, provided always that membership or non-membership in a labor organization is not the criterion for the selection.

It follows, therefore, that a union's demand and insistence during collective bargaining that the employer shall select employees from a roster or registration list, without regard to union membership, and the demand and insistence upon the right to participate in decisions concerning additions to or reductions from the list, do not violate the Act.

e. Selections of Dispatchers

During the negotiations, the Union consistently maintained, as it did at the hearing, that the provision permitting the Union to select dispatchers was not inconsistent with the Act. It contended that, despite the Union's right of selection, dispatchers were actually under the joint supervision and control of the Employers and the Union by means of the Labor Relations Committee. Moreover, the Union argued, dispatchers perform merely routine duties in dispatching longshoremen in rotation from a list, previously established by the Committee, which the Employers have committed themselves to use. Deviations from the hiring hall provisions, and dispatching rules, formulated by the Commit-

tee, the Union maintained, subject dispatchers to discipline or dismissal under the established grievance procedure, and, arbitration, if necessary.

The Employers, while conceding that, technically, this may be true, have contended that, in actual practice, dispatchers have disregarded these provisions, presumably, although this is not established by the record, on instructions from the Union. Thus, the Employers point to the practice whereby dispatchers, after exhausting the registration list, without the consent of employer members of the Committee, have filled available jobs, through members of affiliated or other unions, before affording other non-registered persons opportunity for employment; have accorded preference in employment as a clerk to Cole Jackman, a union representative, and registered longshoremen from another port, but not a registered clerk; have unilaterally refused to dispatch George Phelan, a clerk, and True Knowledge, a longshoreman, despite the fact that they were duly registered men. In addition, the Employers offered evidence that dispatchers frequently exceeded their authority by unilaterally varying the weekly maximum hours of work, and by laying off and "making up" gangs without reference to the rules established by the Committee.

The Union, without admitting these facts, contends that if this has occurred a remedy was available under the contract and dispatching rules for disciplining dispatchers who engaged in such conduct. The Employers, while admitting that they have been lax in enforcing obedience in this respect

to the contract provisions and dispatching rules, point to instances, notably the case of True Knowledge, in which they have resorted to the grievance procedure, and, with respect to the laying off and making up of gangs, to arbitration, which was pending when the contract expired.

Nothing in the Act, however, prevents an employer from agreeing to delegate to the exclusive bargaining agent of the employees, the right to designate an employee, such as the dispatcher, here, who performs merely routine functions, provided such delegation does not result in discrimination based on union membership, or involve unlawful aid or assistance to the Union. It is not alleged or contended, here, that the Respondents, by their insistence upon the right to select dispatchers, who, incidentally, are not required to be union members, have violated Section 8 (b) (1) (B).⁶¹ Moreover, it is clear on this record that dispatchers do not participate in collective bargaining or the adjustment of grievances. Their duties are confined to the immediate supervision of the hiring hall, and the dispatching of employees in accordance with a previously devised plan. It is, therefore, found that the provision for union selection of dispatchers, does not by its terms conflict with the Act.

⁶¹Section 8 (b) (1) (B) provides, in part:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . .

The question to be determined is whether, in view of the instances of discrimination in the practical application of this provision, disclosed by the record, at a time when, as the Union contends, contractual provision for preference of employment based on union membership was permissible under the Act, it is to be reasonably anticipated that such discriminatory practices will be continued in the future, in disregard of the new provisions of the Act proscribing such conduct. In resolving this question, the Union's offer, during the preliminary negotiations, to relinquish preference of employment based on union membership, and to substitute preference based solely on registration may have some relevance. Had the Union maintained this position throughout, a conclusion might have been warranted that the Union sincerely intended to abandon any discriminatory practices arising out of union membership. Since, however, as the record discloses, the Union later shifted its position, and renewed its demands for what amounted to closed-shop conditions, it must be concluded that future discrimination in the application of the provisions relating to dispatchers was contemplated.

The undersigned, therefore, concludes and finds that, although the provision for union selection of dispatchers was not inherently discriminatory with respect to non-union members, it was administered and applied so as to result in such discrimination. It is further found that the Respondents contemplated that such discrimination would continue in

the future if the provision were included in a new contract.

d. Preference of Employment

This leaves for consideration the provision for preference of employment by reason of union membership. It is clear, and the Union does not seriously dispute that such preference, whether of the closed shop, union shop or preferential hiring type, except to the extent and under the circumstances permitted by the proviso to Section 8 (a) (3), is clearly proscribed by the Act. It is therefore found that the provision for preference of employment to union members contained in the 1947 contract was violative of the Act.

e. The Provisions in Practical Application

It has been found that the hiring hall, under the joint control and supervision of employer and union representatives, as a device for recruiting, hiring, and dispatching employees, is not intrinsically violative of the Act. Similarly, it has been found that maintenance of a roster or registration list of qualified employees, which employers agree to use in dispatching employees according to a rotary system, without regard to union membership or affiliation, is equally compatible with the Act. As a corollary, agreement by employers to permit the employees' exclusive bargaining agent to participate in determinations regarding additions to or removals from the registration list, insofar as such determinations are not influenced by considerations

of union membership or affiliation, does not, per se, conflict with the Act. So, too, delegation by the employers to the duly recognized bargaining representative, of the right to select dispatchers, subject to control and supervision of a joint employer-union committee, under circumstances and subject to qualifications already mentioned, does not contravene the provisions of the Act. On the other hand, it has been found that provision for preference of employment based on union membership is clearly proscribed by the Act.

Although each of the so-called hiring hall provisions, with the exception of union preference, has not, in itself, been found to conflict with the Act, it is apparent, and the undersigned finds, that in the practical operation and administration of the hiring hall, these provisions, especially when combined with preferential hiring based on union membership, have resulted in discrimination against non-members. The record discloses, however, that during the early stages of the negotiations, the Respondents offered to give up preferential hiring based on union membership, and to substitute preference based on registration and seniority, without regard to union membership. It is, therefore, appropriate to consider whether, if the remaining provisions upon which the Union insisted were continued in any agreement, and administered as they had been in the past, discrimination would be likely to occur in the future. The evidence concerning past discriminatory practices, the extent to which the hiring hall has been available to non-union

longshoremen (with due allowance for the existing union preference), and the discriminatory conduct in which dispatchers have been found to have engaged, convinces the undersigned that, even if the Union relinquished preference of employment for its members, without change in the remaining hiring hall provisions, the discrimination which has developed through hiring hall practices in the past would be perpetuated in the future. It is reasonable to infer, and the undersigned infers and finds, that the Respondents contemplated that, even without union preference, the hiring hall provisions, if continued, would be administered and enforced in the future so as to discriminate in favor of members of the Union and against non-members, in violation of the Act.

Assuming, however, that the provisions, in practical application, if not in terms, were discriminatory within the meaning of the Act, it does not follow that the mere demand, however vigorous and emphatic, without more, for inclusion of such provisions is sufficient to sustain a finding that the Union has caused or attempted to cause the Employers to discriminate against employees on account of union membership. This view appears to be supported by the legislative history dealing with Section 8 (b) (2).⁶²

⁶²Senator Taft's remarks in this connection, when he presented the conference bill to the Senate, are revealing:

Paragraph (2) [of Section 8 (b)], which makes it an unfair labor practice for a labor

It is clear from the record that not until the final stages of the negotiations did the Respondents or their representatives threaten to strike over the hiring hall issues. WEA Vice-President and General Manager Clark, himself, testified that the hiring hall did not become a "strike issue" until the last bargaining conference before the strike. Even assuming that, on the basis of their experience in collective bargaining with the Union during the past 14 years, the Employers could reasonably have concluded that failure to reach an accord would inevitably result in a strike, such a conclusion cannot be equated with a strike threat. Moreover, it does not follow that the Employers would have been justified in concluding that a strike would ensue even if agreement were reached on all issues save the hiring hall.^{62½} The record warrants no

organization to cause or attempt to cause an employer to discriminate against employees, departs from the text of the corresponding paragraph in the Senate amendment in two respects. The original Senate language used the words "to persuade or attempt to persuade."

The House conferees objected on the ground that it seemed inconsistent with the provisions guaranteeing all parties freedom of expression. The conferees clarified this language so that it reads "to cause or attempt to cause." (Cong. Rec., June 5, 1947, p. 6600.) (Emphasis supplied.)

^{62½}The undersigned has not overlooked the evidence relating to the proceedings under Title II, Section 206-210 of the Act, dealing with national emergencies. While this evidence may establish that

finding, at least until the final stages of negotiations, that the Respondents had manifested a determination to avoid reaching any agreement which did not provide, in terms or, in effect, for the hiring hall contained in the 1947 contract.

After August 30, 1948, however, the Union appeared to have changed its position regarding its original proposal to substitute registration, for union membership, as a basis for preference of employment, and insisted on retention of all the hiring hall provisions, subject to the "saving clause." At this stage, the Respondents made it reasonably apparent that they would strike unless their demands on all unsettled issues, including the hiring hall, were met. Thus, on August 30, James Kearney, president of ILWU Local 10, notified WEAC Manager Gregory, who, in turn, communicated this advice to WEA Vice-President and Manager Clark, that the Union had ordered stop-work meetings of both the longshoremen and checkers to begin midnight, September 1, and to last indefinitely. That the likelihood of strike action was imminent is further evident from the Employers' insistence upon a definite commitment as to the probable duration of the stop-work meetings.

The Respondents, however, contend that the strike was called, not to enforce their hiring hall

a strike was reasonably to be anticipated if the existing contracts expired without agreement, it does not establish that the Respondents had threatened to strike in order to enforce their hiring hall demands.

demands, on which they claim the parties had reached substantial agreement, save for the method of dealing with the savings clause, but to enforce their so-called economic demands. ILWU Research Director Fairley, however, in his testimony, after some equivocation, conceded that disposition of the savings clause, at least, remained a strike issue at this time.

It is obvious that the hiring hall was not the only issue then involved, and that disagreement existed not only with respect to the Union's economic demands, such as wages, hours, vacations, unit coverage, arbitration, and statutory overtime, but also as to the Employers' demands for restriction of the use of the hiring hall to Association members, limitation upon the activities of union business agents, and compensation for overtime under the Fair Labor Standards Act in consequence of the Supreme Court decision. It is also clear from the record that both sides had early taken the position that no agreement would be consummated unless agreement were reached on all issues.

The General Counsel contends that any doubt that the hiring hall demands were a principal strike issue is dispelled by the evidence that "the ILWU immediately engaged in mass picketing at Fort Mason when the Army, with whom it had no dispute, attempted to hire longshoremen through its own personnel office in an effort to load its own cargo ships." In further support of his position, the General Counsel points out that "when the Army secured the services of an independent con-

tractor, who in turn obtained longshoremen through the hiring hall, the ILWU at once removed the pickets." Since, he further contends, the object of the picketing was to cause the Army to cease hiring longshoremen through its own facilities, and to hire through the hiring hall instead, the conclusion is inescapable that attainment of hiring hall conditions was a primary object of the strike.⁶³ The difficulty with the General Counsel's position is that the evidence fails to establish that the pickets were members of any of the Respondent Unions; that they had been instructed, directed or authorized by the Respondents to engage in picketing at the time and place in question; or that such conduct had been approved or ratified by the Respondents. Assuming, however, that the evidence can support an inference that the picketing was legally attributable to the Respondents on established principles of agency, this evidence does not establish that the object of the picketing at Fort Mason was to compel the Employers to yield to the Respondents' hiring hall demands. It is equally reasonable to infer that the purpose of the picketing was to publicize the existence of the labor dispute, and to enlist support for the Union's economic demands. The undersigned concludes and finds, therefore, that this evidence alone fails to establish that a principal object of the strike was to compel

⁶³No violation of Section 8 (b) (4) is alleged or involved, inasmuch as the U. S. Army is, of course, excluded from the definition of employer in Section 2 (2) of the Act.

the Employers to capitulate to the Union's hiring hall demands.

It is apparent, however, apart from this evidence, on the record as a whole, that, from on or about August 30, 1948, the Respondents' hiring hall demands constituted an integral part of their economic demands, and that these demands were, at least, a factor in the Union's determination to strike. The Respondents admit that the question of whether the savings clause should be contained in a separate letter rather than in any collective bargaining agreement reached, was a strike issue.⁶⁴ It is unrealistic to believe that the Union would have engaged in a strike upon this narrow aspect of the hiring hall issue, if the broader issue itself were not also involved.

It is well established that where one engages in conduct motivated by considerations which may be lawful, as well as those which may be unlawful, the duty devolves on such person "to disentangle the consequences for which [he is] chargeable from those for which [he is] immune."⁶⁵ The under-

⁶⁴In view of the ultimate resolution of the hiring hall issues, it is unnecessary to consider whether the Respondents' refusal to include the savings clause in a contract would have constituted a refusal to bargain under the decisions of *Heinz Co. v. N. L. R. B.* 311 U. S. 514, 523-526, and *N. L. R. B. v. Todd*, 173 F. 2d 705 (C. A. 2).

⁶⁵*N. L. R. B. v. Remington-Rand, Inc.*, 94 F. 2d 862, 872; *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. 2d 167, 176; *F. W. Woolworth Co. v. N. L. R. B.*, 121 F. 2d 658, 663; and *N. L. R. B. v. The Barrett Co.*, 135 F. 2d 959, 962.

signed considers this salutary principle dispositive of the Respondents' contention that the object of the strike was primarily to enforce the Union's economic demands.

From August 30, 1948, when the hiring hall as a strike issue became manifest, and from and after September 2, when the strike actually became effective, the Respondents remained on strike until December 6, 1948, when the Employers, finally yielding to the Union's demands, executed collective bargaining agreements containing the hiring hall provisions, including preference of employment to union members, which the Respondents had demanded.⁶⁶ That the Employers, in capitulating to the Respondents' demands on the hiring hall issues, also acceded to certain of their economic demands, does not, of course, preclude a finding that continuation of the existing hiring hall was an objective sought to be achieved by the strike.

It is, therefore, found that, by demanding and insisting, on and after August 30, 1948, upon the inclusion, in any collective bargaining agreement, of the aforesaid hiring hall provisions; by thereafter, authorizing and engaging in a strike a substantial objective of which was the achievement of hiring hall conditions, which in express terms or in their performance, cause or attempt to cause

⁶⁶The provision or "savings clause" relating to renegotiation of the hiring hall sections of the contracts, in the event of an adverse legal determination, does not, of course, immunize the hiring hall provisions from attack.

employers to discriminate against employees on the basis of union membership; and by obtaining the execution of such contracts, on and after December 6, 1948, the Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8 (b) (2).

The Respondents' contention that no violation of Section 8 (b) (2) or 8 (a) (3) can be sustained unless and until it is proved that they have engaged in acts of discrimination against specific individuals, has been dealt with, and fully answered, by the Board in the NMU case, already referred to, and is rejected for the reasons there stated.⁶⁷

2. The alleged violation of Section 8 (b) (3)

a. The appropriate unit of longshoremen; majority representation in said unit.

The complaint alleges that all employees performing longshore work⁶⁸ including longshoremen,

⁶⁷See, also, Matter of American Radio Association, C. I. O., et al., and Committee for Companies and Agents, Atlantic and Gulf Coasts, Radio Officers, 82 N. L. R. B., No. 151; Matter of Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., et al., and The Great Atlantic and Pacific Tea Co., 81 N. L. R. B., No. 164, and cases cited.

⁶⁸Longshore work, as defined in the outstanding collective bargaining agreement, substantially adopting earlier definitions since the 1934 award, consists of "all handling of cargo in its transfer from vessel to first place of rest, and vice versa, including sorting and piling of cargo on the dock, and the

gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sack turners, side runners, front men, jitney drivers and lift jitney drivers employed by member companies of the WEA, as shown on Appendix A, constitute, and at all times material herein, have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The Respondents having failed to meet this allegation in their answer, it is deemed admitted.

Upon the basis of the foregoing, and upon the entire record, the undersigned finds that the unit above described, exclusive of supervisors, within the meaning of the Act, is appropriate for the purposes of collective bargaining, and that such unit will assure to these employees the fullest freedom in exercising the rights guaranteed by the Act.⁶⁹

The complaint further alleges that, since prior to June 6, 1947, and at all times material thereafter a majority of the employees in the unit above

direct transfer of cargo from vessel to railroad car or barge, or vice versa, when such work is performed by Employees of the companies parties to this agreement."

⁶⁹Although neither the complaint nor the collective bargaining agreements in the past have specifically excluded from the unit longshoremen in ports of Tacoma, Anacortes, and Port Angeles, employees in those ports have, as will presently appear, been represented by the ILA. It is evident that the parties have not intended to include these employees in the unit, and the above determination is not intended to vary the unit for which the parties have bargained.

described have designated the ILWU as their representative for purposes of collective bargaining with the WEA on behalf of the member companies shown on Appendix A, and that at all times material since, the said ILWU has been the exclusive representative of all employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment within the meaning of Section 9 (a). The Respondents' answer makes no reply to this allegation, and it is, therefore, deemed admitted.

ILWU District No. 1 was originally certified by the Board, on June 21, 1938, in a Decision and Certification of Representatives, as exclusive representative of "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, and Shipowners' Association of the Pacific Coast" [predecessors of the present associations].⁷⁰ On June 16, 1941, however, on a petition filed by the ILA, the Board directed an election between ILA locals in each of the three ports of Tacoma, Anacortes, and Port Angeles, and ILWU District No. 1, to determine the collective bargain-

⁷⁰Matter of Shipowners' Association of the Pacific Coast, et al., 7 N. L. R. B. 1002, in which the circumstances of the change of affiliation from the ILA to the ILWU are also described.

ing representative in each of said ports.⁷¹ As a result of this election, the Board, on July 29, 1941, certified each of the three ILA locals as exclusive representative of longshoremen in the respective ports of Tacoma, Anacortes, and Port Angeles.⁷² So far as the record discloses, longshoremen in each of these ports have been represented since by the ILA locals.

Since then, collective bargaining agreements have been executed between the WEA and the ILWU, covering longshoremen employed by members of the WEA on the Pacific Coast. The last agreement prior to the opening of the original hearing expired on June 15, 1948. The current agreement expires on June 15, 1951, subject to automatic renewal.

Upon the basis of the foregoing, and the entire record, including the evidence relating to the strike of September 2, in which all longshoremen in the unit herein found to be appropriate participated, the undersigned concludes and finds that, since June 6, 1947, at least, and at all times material herein, the ILWU has been the exclusive representative of all employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment within the meaning of Section 9 (a) of the Act.

⁷¹Matter of Shipowners' Association of the Pacific Coast, et al., 32 N. L. R. B. 668.

⁷²Matter of Shipowners' Association of the Pacific Coast, et al., 33 N. L. R. B. 845.

b. The appropriate units of ship clerks and checkers; majority representation in said units

(1) The San Francisco Bay area

The complaint alleges, but the Respondents' answer denies, that all clerical workers, exclusive of supervisory employees, who receive, deliver, check the loading or discharging, or spot ship's cargo to or from marine terminals, employed, in the San Francisco Bay area, by member companies of the WEAC, as shown on Appendix A, constitute, and at all times material herein, have constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

The complaint further alleges that, on and before March 30, 1946, a majority of the employees in the above-described unit had designated ILWU Ship Clerks' Association, Local 34, as their representative for the purposes of collective bargaining with the WEAC, and that at all times material since, the said Union has been the exclusive representative of all the employees in the unit above described for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

(2) The Los Angeles-Long Beach area

The complaint alleges, but the Respondents' answer denies, that all dock checkers, tally clerks, coopers, spotters, and hatch watchmen, exclusive of supervisory employees, employed in the Los

Angeles-Long Beach Harbor area, by member companies of the WEAC, as shown on Appendix A, constitute, and at all times material herein, have constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

The complaint further alleges that, on and before November 26, 1946, a majority of the employees in the unit above described had designated ILWU Marine Clerks Association, Local 1-63, as their representative for the purposes of collective bargaining with the WEAC, and that at all times material since, the said Union has been the exclusive representative of all employees in the unit above described for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

(3) The Oregon-Columbia River area

The complaint alleges, and the Respondents' answer denies, that all checkers, exclusive of supervisory employees, employed in the Oregon-Columbia River District, by member companies of the WEAC (formerly WEP), as shown on Appendix A, constitute, and at all times material herein have constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

The complaint further alleges that, on and before July 26, 1946, a majority of the employees in the unit above described had designated ILWU Local

1-40 (formerly ILA Supercargoes and Checkers Local 38-78-A), as their representative for purposes of collective bargaining with the said WEOC, and that at all times material since, the said Union has been the exclusive representative of all employees in the unit above described for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

The Respondents, though denying the appropriateness of the units described above, and affirmatively alleging that the appropriate unit of ship clerks and checkers is that described in the Board's Decision and Direction of Election, issued September 28, 1946,⁷³ make no response to the allegations of majority status of the respective locals in each of said units. These allegations are, therefore, deemed admitted. In the amendment to their answer, filed on October 26, 1948, the Respondents "admitted" that none of the units alleged to be appropriate included "persons who are supervisors within the meaning of Section 2 (11) of the Act."

The Decision, Direction of Election, and Order, to which the Respondents advert, resulted from an amended petition for investigation and certification of representatives filed on June 3, 1946, by the ILWU, seeking a unit of all ship clerks, checkers, supervisors, and supercargoes, who work in Pacific Coast ports for member companies of one or more of the Associations (WEA, WEAC,

⁷³Matter of Waterfront Employers Association of the Pacific Coast, et al., 71 N. L. R. B. 121.

WEOC, formerly WEP). In effect, the ILWU sought to combine in a single coastwide unit the clerks and checkers then bargained for in four separate area units, comprising the areas of Northern California, Southern California, Washington, and Oregon.⁷⁴

In its Decision referred to above, the Board indicated that, although "a single multiple-employer unit [of checkers], coastwide in scope and coextensive with the membership of the several employer associations" was appropriate, a separate unit of checkers employed in the Washington area by member companies of WEW, might also be appropriate. The Board, therefore, directed an election among checkers employed in the State of Washington, exclusive of the Columbia River ports, by member companies of the WEW and the WEA, to determine whether they desired to be represented by

⁷⁴Prior to 1943, bargaining in each of these areas was conducted between the respective regional employer associations then in existence and the local clerks or checkers unions. Although, as has been indicated elsewhere, the Waterfront Employers Association of San Francisco, representing employers in Northern California, and the Waterfront Employers Association of Southern California, representing similar employers in Southern California, merged in 1943 to become the WEAC, bargaining with respect to clerks and checkers appears to have been conducted separately in California on the basis of the Northern and Southern areas. For a comprehensive history of collective bargaining regarding these classifications of employees, see *Matter of Waterfront Employers Association of the Pacific Coast*, 71 N. L. R. B. 121.

the ILA or the ILWU. Regarding checkers in the Oregon, and Northern and Southern California areas, the Board decided it was unnecessary to direct an election, inasmuch as the ILWU had been recognized as majority representative of these employees, and its status in those three combined areas had not been questioned. The Decision provided that, in the event the employees in the Washington area selected the ILWU as bargaining representative in the election, they would have indicated a desire to be bargained for as part of a unit of all checkers employed on the Pacific Coast by members of one or more of the employer associations. If, however, they selected the ILA, they were to be regarded as having indicated a desire to constitute a separate appropriate unit.

On May 13, 1947, following this election, the Board certified the ILA as exclusive representative of checkers employed in the State of Washington, exclusive of the Columbia River ports, by employer members of either the WEW, the WEA, or both.⁷⁵ Except in the Washington area, exclusive of the Columbia River ports, where they have been represented by the ILA, clerks and checkers on the Pacific Coast have since been represented by the ILWU, through its affiliated locals. Apart from findings in its Decision and Direction of Election, the Board has never certified the ILWU as

⁷⁵Matter of Waterfront Employers Association of the Pacific Coast, et al., Supplemental Decision and Certification of Representatives, Case No. 20-R-1690, issued May 13, 1947. (Unpublished.)

exclusive representatives of the ship clerks and checkers.

It is clear, however, that the Employers have since recognized the several ILWU locals, named above, as bargaining representatives of these employees in the respective regional areas, and have executed contracts with them on a regional basis. The principal controversy, apparently not yet resolved, has been over the ILWU's attempts to bargain on behalf of these employees on a coastwise basis, as in the case of longshoremen, and the Employers' insistence upon bargaining on a regional or area basis.

As has been pointed out elsewhere, the Coast Longshore Agreement has traditionally established the pattern for collective bargaining regarding clerks and checkers. Separate coast negotiating committees have been established in the past to bargaining on behalf of these latter employees, but these committees function generally under the ILWU's Coast Longshore Negotiating Committee, which in practice conducts the principal negotiations. After settlement of the 1948 strike, a master agreement was executed, on behalf of clerks and checkers in all ports, between the ILWU, acting on behalf of the individual locals, and the WEA, on behalf of the WEAC and the WEOC, with individual port supplements between the regional associations and the ILWU locals involved. It is apparent, however, that throughout the negotiations culminating in these agreements, the parties have attempted to preserve their respective positions.

Thus, the Employers, while generally acquiescing in negotiations with the ILWU Ship Clerks Committee covering all regions, culminating in a master clerks' agreement, have insisted on port supplements for each of the regional areas. The ILWU, though acceding to this arrangement, has persevered in its attempt to persuade the Employers to bargain with respect to clerks and checkers on a coastwise basis.

In view of the foregoing, and upon the entire record, the undersigned concludes and finds that the several units of clerks and checkers, as alleged in the complaint, are appropriate for the purposes of collective bargaining, and that these units will assure to these employees the fullest freedom in exercising the rights guaranteed by the Act. The undersigned further finds, in view of the implicit admission in the Respondents' answer, the evidence of continuous contractual relations between the respective parties; the participation by these employees in the strike of September 2, 1948; and the entire record that, since on or about the respective dates mentioned above, the several named ILWU locals have been the exclusive representatives of the employees in the respective units of ship clerks and checkers, described above, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment within the meaning of Section 9 (a) of the Act.⁷⁶

⁷⁶It should be noted that, in its Decision and Direction of Election, dated September 28, 1946.

c. The refusal to bargain

The complaint alleges that throughout the negotiations, beginning about April 13, 1948, between the ILWU, and its affiliated locals, on one hand, and the WEA, the WEAC, and the WEOC, on the other, the Respondents demanded and insisted that the Employers agree to and execute collective bargaining agreements containing hiring hall provisions, which, by their express terms, or in practical operation, required them to discriminate with regard to the hire and tenure of employment of employees, in violation of the Act. The complaint, as amended, further alleges that, because of the refusal of the Employers to accede to these demands, and in order to compel them to yield thereto, the

(prior to the amendment of the Act), the Board included supervisors and supercargoes within the unit. During negotiations, the Employers insisted that these employees be excluded from the unit on the ground that they were supervisors within the meaning of the amended Act. The ILWU was equally insistent that they be included. Since the parties, by collective bargaining, have included these categories of employees in the current contracts, and, since the amended Act does not prevent employers from recognizing and bargaining with employees who may fall within the definition of supervisors, the undersigned does not intend by the findings herein to disturb the unit established by mutual consent of the parties. In the port supplement, covering the Oregon-Columbia River area, these employees are defined as follows:

(a) Checkers: A checker is an employee who receives, delivers, checks, spots, or weighs cargo to or from marine terminals, including

Respondents, on and after September 2, 1948, authorized and engaged in a strike or concerted refusal to perform services for the members of the Associations. As further amended, the complaint alleges that, on or about December 1, 1948, in order to terminate the strike, the Employers yielded to the Respondents' demands, and on December 17, 1948, and thereafter, executed contracts containing the terms and provisions upon which the Respondents had been insisting. It is contended that, by the foregoing conduct, the Respondents have refused to bargain with the Employers in violation of Section 8 (b) (3) of the Act.

The General Counsel's position is presumably based upon the conclusion that, from on or about April 13, 1948, until the contracts were finally

piers, wharves or ships. (Basic agreement, Section 2 (a).)

(b) Supervisor: A supervisor is an employee who is assigned regularly to the direction or supervision of the work of other checkers, but who may be assigned to the work covered by this agreement, as incidental to his other duties.

(c) Supercargoes: A supercargo is an employee who supervises the loading and/or discharging operations of a vessel. A supercargo is the direct representative of the employer and in conjunction with other representatives of the employer, is responsible for the safe, efficient and proper handling of cargo and shall have authority to hire, supervise, place and/or discharge men, and shall perform his duties in accordance with the orders of his employer. A supercargo's duties do not require him to do

executed, the Respondents had demonstrated such intransigence on the hiring hall issues as to preclude the possibility of any agreement.

The obligation imposed by the Act upon labor organizations, as well as employers, to bargain in good faith is defined in Section 8 (d) of the Act. As further explicated by the Board in the NMU case, the mere adoption by a union of a position, however adamant, concerning a hiring hall, or any other issue, does not establish a refusal to bargain in good faith. As the Board there noted, the position taken by the Union on this issue was no more adamant than that of the employer.

The Board has frequently recognized that, as the Act does not require final agreement or the granting of concessions, the parties may reach an impasse which does not reflect on the good faith of the bargaining.

the work of checkers or supervisors except as incidental to his other duties.

(1) **Checker-Supercargo:** A checker-supercargo is an employee who has been so registered by the Labor Relations Committee as qualified to be employed in either the capacity of a checker or as a supercargo.

The port supplement, covering the Los Angeles-Long Beach Harbor area, merely enumerates these categories of employees as follows:

Classifications:

Clerks: Ship; Dock; Car; Coopers; Tally; Spotters; Hatch watchmen.

Supervisors: Floor Runners; Ship Runners; Car Runners; Chief Receiving and Delivery Clerks; Chief Coopers.

Supercargoes

But what the Act does not permit is the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.⁷⁷

The record in the instant case, far from establishing the Respondents' intransigence on the hiring hall issues, during the early stages of the negotiations, indicates that the Respondents had offered to forego preference of employment based on union membership, and to substitute, instead, preference based on registration, alone. Their offer to provide for renegotiation, in the event of an adverse legal determination of the provision for union selection of dispatchers, is a further manifestation of willingness to bargain on the hiring hall issues.

On about August 30, 1948, however, after the Employers had substantially acceded to the Union's proposals on the hiring hall, the Respondents shifted their position, presumably, because (although the undersigned regards the reason as immaterial), the employees had undergone a change of

⁷⁷NMU case, 78 N.L.R.B. 971, 981-982.

mind after the issuance of the injunction and the unfair labor practice charge.

At this juncture, the Respondents clearly demonstrated that the Union would execute no agreement which did not include the substantive features of the hiring hall contained in the 1947 contract, or which did not provide, in effect, for continuation of the hiring practices which had prevailed under that contract. This position was manifested, in part, by the fact that, although as Bridges stated, the Union was willing to defer settlement of vacations, arbitration, and other disputed issues, the Union insisted upon resolution of the hiring hall issues as a condition precedent to the execution of any agreement.

The undersigned, therefore, finds that by their insistence upon the continuation of hiring hall provisions and practices now prescribed by the Act as a condition precedent to consummation of any agreement, the Respondents, on and after August 30, 1948, refused to bargain in violation of Section 8 (b) (3) of the Act. It is further found that, by insisting on, threatening to strike, and later striking to secure these hiring hall provisions, including preference of employment based on union membership, as a condition precedent to agreement, and on and after December 1, 1948, compelling the Employers to execute collective bargaining agreements containing the aforesaid provisions, the Respondents have further refused to bargain in violation of Section 8 (b) (3) of the Act.

The Respondents contend, however, that the Em-

ployers' announcement on September 2, that they would not bargain with the Union unless and until it complied with the requirements of Section 9 (h) of the Act, and the later announcement that they would refuse to deal with "irresponsible leadership," in themselves constituted a refusal by the Employers to bargain, and relieve the Respondents of the correlative duty to bargain. The Respondents point out that on two later occasions they requested the Employers to resume negotiations and that said requests were refused or ignored. Since neither of these demands was accompanied by an offer to recede from their position on the hiring hall demands, which have been found to be unlawful, the obstacle to further negotiations remained. While it is true that the Employers' imposition of a new condition at the eleventh hour in the negotiations, casts serious doubt upon their good faith, the Board has held that such circumstances do not absolve a union from responsibility for a refusal to bargain in a case "where the statutory obligation to bargain was breached by [the union's] fixed determination to require as a condition to the conclusion of any agreement, the inclusion of provisions 'which, by their very terms or in their effectuation, are repugnant to the Act's specific language or basic policy.' "78

⁷⁸See *Matter of American Radio Association, et al.*, 82 N. L. R. B., No. 151 where, in a similar situation, it was held that the principle enunciated in the *Matter of Times Publishing Company*, 72 N. L. R. B. 676, apparently relied on by the Respondents here, was no defense to a refusal to bargain by a union.

3. The alleged violation of Section 8 (b) (1) (A)

Except for the evidence offered by the General Counsel as to the case of True Knowledge, and other instances of alleged discrimination occurring prior to the enactment of the statute, while a valid preferential hiring provision was in effect, it is not alleged, or contended, apart from the violation of Section 8 (b) (2) and Section 8 (b) (3), that the Respondents have restrained or coerced employees in the exercise of the rights guaranteed in Section 7, in violation of Section 8 (b) (1) (A). With respect to the instances of discrimination cited, the General Counsel conceded that the evidence was offered solely for the purpose of illustrating the manner in which the hiring hall had been administered in the past. Since, as the Respondents point out, these discriminatory practices were committed at a time when preference of employment based on union membership was permissible under the statute then in effect, and since the unfair labor practices were not specifically alleged in the complaint, or relied on at the hearing for any other purpose, this evidence can afford no basis for a finding of violation of this section of the statute.

With respect to the alleged violation of Section 8 (b) (1) (A), deriving from the other unfair labor practices found, the Board has already held, for reasons stated in its decisions, that such violations do not afford a basis for such finding.⁷⁹ The

⁷⁹See *Matter of National Maritime Union of America*, 78 N. L. R. B. 971, 982-987; *Matter of*

undersigned, will therefore, recommend that these allegations of the complaint be dismissed.

Mention has already been made of the economic factors which the Board is asked to consider in appraising the Respondents' conduct. In addition, the Respondents stress the drastic decline in available longshore work, resulting from the decline in west coast shipping, since early December, 1948, when work was resumed after the settlement of the strike.⁸⁰ This evidence is presumably directed to the economic argument that, since there is not enough available work for registered longshoremen already on the lists, the labor market should not be glutted by permitting more longshoremen to compete for the available jobs. Acute as this problem may be,

American Radio Association, et al., 82 N. L. R. B., No. 151; Matter of National Maritime Union of America, et al., and Committee for Companies and Agents, Atlantic and Gulf Coast, Unlicensed Personnel, 82 N. L. R. B., No. 152.

⁸⁰A statistical summary of the aggregate number of hours worked by all longshoremen, with a weekly break-down, between December 12, 1948, and March 27, 1949, together with the average number of hours worked weekly per longshoreman, designed to substantiate the Respondents' position, was received in evidence. On May 9, 1949, after the hearing had been closed, the parties submitted to the undersigned a stipulation, substituting a revised schedule, correcting certain inaccuracies in the original exhibit, which do not affect the ultimate conclusion. The revised schedule is hereby substituted for original Respondents' Exhibit 36, and marked accordingly.

it is one with which the Board may not be concerned in resolving the issues before it.

This leaves for consideration the Request for Dismissal, joined in by the Employers and the Respondents, and urged upon the undersigned when the hearing was reconvened. The grounds advanced therefor are obviously based on reasons of expediency. It is urged that, inasmuch as the strike has been settled, collective bargaining agreements concluded and industrial peace restored to the waterfront, the Board ought not to intervene and take action which might be disruptive of the harmonious relationships between the Employers and the Union and to the industry generally.⁸¹ Similar contentions

⁸¹By letter dated March 18, 1949, received in evidence, the General Counsel advised the undersigned that he had been visited by representatives of the ILWU and the WEA, who, protesting further proceedings in the cases, requested that "the complaint be dismissed and the charge or charges withdrawn." Submitted with this communication was a letter which had been handed the General Counsel at the conference by the WEA and PASA, signed by their attorneys, the text of which follows:

The shipping industry on the Pacific Coast is now operating under collective bargaining agreements recently negotiated which have so far operated successfully. It would be extremely unfortunate from the standpoint both of the industry and of the public if the present harmonious employer-union relationships were to be upset by an order of the National Labor Relations Board requiring a change in hiring practices. Waterfront Employers Association of the Pacific Coast and the Pacific American Shipowners Association therefore join with the

were advanced by the Respondents in the ARA case,⁸² and disposed of by the Board with the following observation:

Capitulation by the Employers to the Respondents' discriminatory hiring hall plan, instead of lessening the need, shows an impelling necessity for an order designed to remedy the unfair labor practices found, and to prevent their perpetuation. In any event and apart from the alleged contract asserted by the Respondents, we are convinced that the policies of the Act can best be effectuated by an order requiring the Respondents to take the remedial and affirmative action hereinafter set forth.

It need hardly be added that the Act permits no immunity because of a belief that "exigencies of the moment require infraction of the statute."⁸³

International Longshoremen's and Warehousemen's Union and the National Union of Marine Cooks and Stewards in asking that the proceedings against those two unions now pending before the Board be dismissed.

Continuing, the General Counsel's letter stated that, having regarded the communication in the nature of a motion to dismiss, he had advised the parties that the matter rested with the Trial Examiner, and ultimately, with the Board, and was, therefore, submitting the letter to the undersigned. He noted, however, that he not only declined to join in the request, but specifically opposed it.

⁸²Matter of American Radio Association, et al., *supra*.

⁸³See. N. L. R. B. v. Star Publishing Co., 97 F. 2d 465, 470.

Administrative agencies, as well as the courts, cannot permit their determinations to be influenced by tacit threats of strikes or other forms of reprisal, or by considerations of expediency in executing the laws they have been appointed to administer. Any other course would lead to anarchy and chaos. As Judge Jerome Frank observed in the NMU case:

... respondents, who deem the statute harmful, must pursue the constitutional, democratic, process of either persuading the present Congress or electing new Senators and Congressmen who agree with them. In a democracy, "men should not think it slavery to live according to the rule of the Constitution; for it is their salvation."⁸⁴

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the business operations of the companies, set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and between the several States and foreign countries, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

⁸⁴N. L. R. B. v. National Maritime Union of America, CIO, et al., 175 F. 2d 686 (C. A. 2), enf'g 78 N. L. R. B. 971.

V. The remedy

It has been found that, by insisting upon and striking to compel the Employers to yield to their demands for the hiring hall provisions, the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (2). The execution of contracts containing these provisions, which intrinsically, or in their practical application, discriminate against employees on the basis of union membership, is equally violative of this section. It will, therefore, be recommended that the Respondents be required to cease giving effect to those provisions of the contracts, or to any extension, renewal, modification, or supplements thereto, or to any superseding contracts, which, by their terms or in their performance, require the Employers to discriminate in regard to the hire or tenure of employment or any term or condition of employment of employees who are not members of ILWU, except in accordance with the proviso in Section 8 (a) (3) of the Act. Inasmuch as the strike has been found to be one of the means by which the Respondents have obtained such contracts, and since there appears likelihood that such methods may be resorted to in the future to perpetuate such provisions, practices, or procedures, it will further be recommended that the Respondents be enjoined from engaging in strike action for such purposes in the future.

It has further been found that the Respondents have refused to bargain in violation of Section 8 (b) (3). It will, therefore, be recommended that

the Respondents bargain collectively with the Employers, upon request, so long as they are the exclusive representatives of the employees in the various units found to be appropriate, subject to the provisions of Section 9 (a) of the Act.⁸⁵

Since it has been found that the Respondents have not engaged in unfair labor practices within the meaning of Section (8) (b) (1), it will be recommended that those allegations of the complaint be dismissed.

Conclusions of Law

1. International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, Supercargoes and Checkers Union Local 40, each affiliated with International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, are each labor organizations within the meaning of Section 2 (5) of the Act.

2. All longshoremen and persons engaged in the performance of longshore work, as defined elsewhere herein, employed by members of the WEA on the Pacific Coast, except as hereinabove noted, constitute, and at all times material herein, have con-

⁸⁵See Matter of National Maritime Union of America, CIO, 78 N. L. R. B. 971, 987-988.

stituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, was on June 6, 1947, and has been, at all times material since, the exclusive representative of all longshoremen employed by members of the WEA, with the exceptions noted, in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. Ship clerks and checkers, as hereinabove defined, employed by members of Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, respectively, in the port areas of San Francisco Bay, Los Angeles-Long Beach Harbor, and Oregon-Columbia River, with the exceptions noted, constitute, and at all times material herein, have constituted separate appropriate units for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Super-cargoes and Checkers Union Local 40, and each of said Locals, were, on or about the respective dates hereinabove mentioned, and have been, at all times material since, the exclusive representatives of ship clerks and checkers, as defined herein, employed by

members of Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, respectively, in the several port areas of San Francisco Bay, Los Angeles-Long Beach Harbor, and Oregon-Columbia River, with the exceptions noted herein, in the separate appropriate units, hereinabove described, for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. By attempting to cause, and causing, the Employers to discriminate against employees in violation of Section 8 (a) (3) of the Act, the named Respondents, and each of them, have engaged and are engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

7. By refusing on or about August 30, 1948, and at all times thereafter, to bargain collectively with the Employers as the exclusive representative of the employees in the various appropriate units above described, the Respondents, and each of them, have engaged in, and are engaging in unfair labor practices within the meaning of Section 8 (b) (3) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

9. The Respondents, and each of them, have not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and, upon the entire record in the case, the undersigned recommends the following:

1. International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, its officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Giving effect to those provisions of the collective bargaining contract, or to any extension, renewal, modification, or supplements thereto, or to any superseding contracts, between the said ILWU and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, and their respective members, dated December 6, 1948, which expressly, or in their performance require membership in International Longshoremen's and Warehousemen's Union as a condition of employment, or which prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the proviso to Section 8 (a) (3) of the Act;

(2) Refusing to bargain collectively with the Employers of the employees in the unit of longshoremen found to be appropriate herein, so long as it is the exclusive representative of said employees.

subject to the provisions of Section 9 (a) of the Act;

(3) Requiring, instructing, or inducing its representatives to insist upon the inclusion in any agreements reached with the Employers of provisions which expressly, or in their performance, require membership in the ILWU as a condition of employment, or prevent the Employers from securing or retaining employees upon a non-discriminatory basis, except in accordance with the proviso in Section 8 (a) (3) of the Act;

(4) Directing, instigating, or encouraging employees to engage in a strike, or approving or ratifying strike action taken by employees, for the purpose of requiring that the Employers execute or acquiesce in the demands of the Union for the performance of contracts, or provisions therein, which expressly, or in their performance require membership in ILWU as a condition of employment, or which would prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the provisions of Section 8 (a) (3);

(5) Causing or attempting to cause the Employers to discriminate in any manner against employees, in violation of Section 8 (a) (3).

(b) Take the following affirmative action which the undersigned finds will effecuate the policies of the Act:

(1) Upon request, bargain collectively with the

Employers of the employees in the unit found to be appropriate, so long as it is the exclusive representative of these employees;

(2) Notify applicants for employment as long-shoremen that it will not demand or insist upon the performance or observance in any contract between the Employers and the ILWU of provisions which expressly, or in their performance, require membership in the ILWU as a condition of employment, or which would prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the provisions of Section 8 (a) (3) of the Act;

(3) Post immediately in conspicuous places at the meeting halls, hiring halls, and offices of the ILWU, and all other places where notices to members are customarily posted, copies of the form of notice attached hereto and marked Appendix B. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by a duly authorized officer of the ILWU, be posted and maintained for a period of sixty (60) consecutive days;

(4) Furnish the Regional Director for the Twentieth Region signed copies of the form of notice, attached hereto as Appendix B, for posting, with the consent of the Employers, on bulletin boards at their offices and the hiring halls, and all other places where notices to employees are customarily posted by said Employers. The notice shall be posted on the bulletin boards of the Employers

and maintained thereon for a period of sixty (60) consecutive days thereafter. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed as provided in paragraph 1 (b) (3) hereof, be forthwith returned to the Regional Director for said posting;

(5) Notify the Regional Director for the Twentieth Region in writing, within twenty (20) days from the date of this Intermediate Report and Recommended Order, what steps the ILWU has taken to comply therewith.

2. International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union Local 40, each affiliated with the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, their respective officers, representatives, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Giving effect to those provisions of the several collective bargaining contracts, or to any extensions, renewals, modifications, or supplements thereto, or to any superseding contracts, between the said ILWU, on behalf of its affiliated locals named herein, and between the said locals, and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, the Waterfront Employers

Association of California, and Waterfront Employers of Oregon and Columbia River, dated January 17, 1949, and the port supplements, dated March 11, 1949, and March 25, 1949, respectively, which expressly, or in their performance, require membership in the ILWU or its affiliated locals as a condition of employment, or which prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the proviso in Section 8 (a) (3) of the Act;

(2) Refusing to bargain collectively with the Employers of the employees in the several units of ship clerks and checkers found to be appropriate herein, so long as the respective Unions are the exclusive representatives of said employees, subject to the provisions of Section 9 (a) of the Act;

(3) Requiring, instructing, or inducing their respective representatives to insist upon the inclusion in any agreement reached with the respective Employers of any provisions which expressly, or in their performance, require membership in the respective Unions as a condition of employment, or prevent the Employers from securing or retaining employees, upon a non-discriminatory basis, except in accordance with the proviso in Section 8 (a) (3) of the Act;

(4) Directing, instigating, or encouraging employees to engage in a strike, or approving or ratifying strike action taken by employees, for the purpose of requiring that the Employers execute or acquiesce in the demands of the said Unions for

the performance of contracts, or provisions therein, which expressly, or in their performance, require membership in the said Unions as a condition of employment, or which would prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the provisions of Section 8 (a) (3) ;

(5) Causing or attempting to cause the Employers to discriminate in any manner against employees, in violation of Section 8 (a) (3).

(b) Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(1) Upon request, bargain collectively with the Employers of the employees in the several units of ship clerks and checkers herein found to be appropriate, so long as the said Unions are the exclusive representatives of said employees ;

(2) Notify applicants for employment as ship clerks and checkers that they will not demand or insist upon the performance or observance in any contract between the Employers and the said Unions of provisions which expressly, or in their performance, require membership in said Unions as a condition of employment, or which would prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the provisions of Section 8 (a) (3) of the Act ;

(3) Post immediately in conspicuous places at the meeting halls, hiring halls, and offices of each

of the said Unions, and all other places where notices to members are customarily posted, copies of the form of notice attached hereto and marked Appendix B. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by the respective duly authorized officers of said Unions, be posted and maintained for a period of sixty (60) consecutive days;

(4) Furnish the Regional Director for the Twentieth Region signed copies of the form of notice, attached hereto as Appendix B, for posting, with the consent of the Employers, on bulletin boards at their offices and the hiring halls, and all other places where notices to employees are customarily posted by said Employers. The notice shall be posted on the bulletin boards of the Employers and maintained thereon for a period of sixty (60) consecutive days thereafter. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed as provided in paragraph 2 (b) (3) hereof, be forthwith returned to the Regional Director for said posting;

(5) Notify the Regional Director for the Twentieth Region in writing, within twenty (20) days from the date of this Intermediate Report and Recommended Order, what steps the said Unions have taken to comply therewith.

It Is Further Recommended that the complaint, as amended, be dismissed with respect to the allegations that the Respondents or any of them have

restrained and coerced employees in violation of Section 8 (b) (1) (A) of the Act.

It Is Further Recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, the Respondents notify the said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the said Respondents to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or

mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 30th day of November, 1949.

/s/ IRVING ROGOSIN,
Trial Examiner.

APPENDIX A

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Alaska Steamship Company Pier 42 Seattle, Washington	x	x			
Alaska Terminal & Stevedoring Co. Pier 42 Seattle, Washington	x	x			
Alaska Transportation Company Pier 58 Seattle, Washington	x	x			
Albina Dock Company 211 Board of Trade Bldg. Portland, Oregon	x	x	x		
American-Hawaiian SS Co. 215 Market Street San Francisco, California	x	x	x	x	x
American Mail Line, Ltd. 522 Pacific Bldg. Portland, Oregon	x	x	x		
American Pacific Steamship Co. 541 South Spring Street Los Angeles 13, California	x			x	x
American President Lines, Ltd. 311 California Street San Francisco, California	x			x	x
American Stevedore Company Pier #92 San Francisco, California	x			x	
Ames Terminal Company 3200-26th S.W. Seattle, Washington	x	x			
Anglo-Canadian Shipping Co. 1714 Arctic Bldg. Seattle, Washington	x	x	x		
Arlington Dock Company Pier 56 Seattle, Washington	x	x			
Arrow Stevedore Co. 310 Sansome Street San Francisco, California				x	

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Associated Banning Company 112 Market Street San Francisco, California	x			x	x
A/S Thor Dahl (Pac. Is. Transport Line) (By General SS Corp. Let.) 465 California Street San Francisco, California	x			x	x
Bank Line P.O. Box 257 Long Beach, California					x
Barber Steamship Lines, Inc. (Sudden & Christenson Overseas Corp.) 310 Sansome Street San Francisco, California	x				x
Blue Star Line, Inc. 1801 Northern Life Tower Seattle, Washington	x	x		x	x
Brady-Hamilton Stevedoring Co. Board of Trade Bldg. Portland, Oregon	x	x	x		
Burchard & Fiskien Exchange Bldg. Seattle, Washington		x	x		
Burns Steamship Company 624 North LaBrea Avenue Los Angeles 36, California	x	x	x		x
Calif. Steve. & Ballast Co. 311 California Street San Francisco, California	x			x	
Canadian Transport Co. Ltd. 208 Columbia Street Seattle, Washington	x	x			
W. R. Chamberlin & Co. 465 California Street San Francisco, California	x		x	x	x
City Dock Company Pier 58 Seattle, Washington		x			
Coastwise Line (Coastwise Pacific Line) 150 Sansome Street San Francisco, California	x	x	x	x	x

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Columbia Basin Terminals 1788 N.W. Front Avenue Portland, Oregon	x		x		
Columbia River Steve. Co. P.O. Box 1066 St. Helens, Oregon	x		x		
Compania Naviera Independencia, S.A. (Independence Line) (By General SS Corp. Ltd.) 465 California Street San Francisco, California	x	x	x	x	x
Crescent Wharf & Warehouse Co. P.O. Box 276 Terminal Island, California	x				x
Consolidated Steamship Cos. 64 Pine Street San Francisco, California	x			x	
De La Rama SS Co., Inc. 230 California Street San Francisco, California	x			x	x
Deming, Roberg & Williams, Inc. 1212 Cornwall Bellingham, Washington	x	x			
Ditlev-Simonsen (Pacific Orient Express Line) (By General SS Corp. Ltd.) Stuart Bldg. Seattle, Washington	x	x	x	x	x
Dodwell & Co. Ltd. Colman Bldg. Seattle, Washington	x	x			x
Donaldson Line, Ltd. (Balfour, Guthrie & Co. Agts.) 351 California Street San Francisco, California	x	x	x	x	x
East Asiatic Company, Ltd. 465 California Street San Francisco, California	x				x
El Dorado Terminal Company 311 California Street San Francisco, California	x			x	

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Encinal Terminals Foot of Jay Street Alameda, California				x	
Eureka Stevedoring Company Box 372 Eureka, California	x			x	
Everett Stevedoring Corp. Pier #1 Everett, Washington	x	x			
Far East Steamship Co. Inc. 208 Columbia Seattle, Washington		x			
Fay Agencies 445 Jones Street Ventura, California	x				x
Frank J. Foran, Inc. 230 California Street San Francisco, California	x			x	
Fred Olsen Line, Ltd. 241 California Street San Francisco 11, California	x	x	x	x	x
French Line Suite 608, 310 Sansome Street Alaska Commercial Building San Francisco, California	x	x	x	x	x
Fruit Express Line 465 California Street San Francisco, California	x	x	x	x	x
Funch, Edye & Co. Inc. 260 California Street San Francisco 11, California	x			x	x
Furness, Withy & Co., Ltd. 239 California Street San Francisco, California	x	x	x	x	x
General Steamship Corp. Ltd. 465 California Street San Francisco, California	x	x	x	x	x
General Steve. & Ballast Co. 224 Spear St. San Francisco, California	x			x	
Girdwood Shipping Co. Northern Life Tower Seattle, Washington	x	x	x		

Name and Address of Company	Membership List		WEAC	WEAC	
	WEA	WEW	WEAC	Northern Calif.	Southern Calif.
Golden Gate Terminals 190 Lombard Street San Francisco, California				X	
Grace Line, Inc. (W. R. Grace & Co. Agts.) #2 Pine Street San Francisco, California	X	X	X	X	X
Griffiths Transport Co. 709 Dekum Bldg. Portland, Oregon			X		
Holland America Line 233 California St. San Francisco, California	X			X	X
Howard Terminals 1st & Market Sts. Oakland, California				X	
Humboldt Stevedore Co., Ltd. P.O. Box 1003 Eureka, California	X				
Independent Stevedore Co. Coos Bay, Oregon	X		X		
Indies Terminal Company Berth 230-B Terminal Island, California					X
International Shipping Co. Arctic Bldg Seattle, Washington		X			
International Terminals, Inc. 215 West 6th Street Los Angeles, California					X
Interocean Line 311 California Street San Francisco, California	X			X	X
Interocean Steamship Corp. (Agents for Interocean Line) Dexter Horton Bldg. Seattle, Washington		X	X		
Interstate Terminals 1118 N.W. Front Portland, Oregon	X		X		
Isthmian Steamship Co. 215 Market Street San Francisco, California	X	X	X	X	X

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
James Griffiths & Sons, Inc. Empire Bldg. Seattle, Washington	x	x	x	x	x
Johnson Line #2 Pine Street San Francisco, California	x	x	x	x	x
W. J. Jones & Son, Inc. Board of Trade Bldg. Portland, Oregon	x		x		
Jones Stevedoring Company 311 California Street San Francisco, California	x			x	
Kerr Steamship Co. Inc. (Silver Line) 350 California Street San Francisco, California	x	x	x	x	x
Klaveness Line (Sudden & Christenson Overseas Corp. Agts.) 310 Sansome Street San Francisco, California	x	x			x
Knutsen Line (Knut Knutsen, O.A.S.) 311 California Street San Francisco, California	x	x			x
J. Lauritzen Line 1001 Northern Life Tower Seattle, Washington	x	x	x		
Leslie Salt Company Pier 11-B Lenora St. Dock Seattle, Washington	x	x			
Lidell & Clarke, Inc. 211-12-13 Board of Trade Bldg. Portland, Oregon	x		x		
Linnton Terminals 317 Board of Trade Bldg. Portland 4, Oregon	x		x		
Long Beach Terminals Co. 1441 El Embarcadero Long Beach, California	x				x
Longview Stevedore Co. Mill Site Longview, Washington	x		x		

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Luckenbach SS Company, Inc. (Luckenbach Gulf SS Co.) 100 Bush Street San Francisco, California	x	x	x	x	x
H. E. Mansfield, Inc. 402 Commercial Ave. Anacortes, Washington	x	x			
Marine Agencies, Ltd. 548 South Spring St. Los Angeles, California					x
Marine Terminals Corporation 24 California Street San Francisco, California	x			x	
Marine Terminals Corp. of L.A. Box 365 Wilmington, California	x				x
Matson Terminals Inc. Pier 44 Seattle, Washington		x			
Matson Navigation Co. 215 Market Street San Francisco, California	x	x	x	x	x
John E. Marshall, Inc. P.O. Box 257 Long Beach 2, California					x
Metropolitan Stevedore Company 139 Avalon Blvd. Wilmington, California	x				x
Mission Terminal Company c/o Pac. Steve. & Bal. Co. Transport Bldg. San Francisco 5, California	x			x	
Mitchell Stevedoring Co. Pier 18 San Francisco, California	x			x	
J. J. Moore & Co., Inc. Empire Bldg. Seattle, Washington		x			
Norpac Shipping Co. Lewis Bldg. Portland, Oregon			x		

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
North Pacific Coast Line (Royal Mail Lines Ltd.) (Holland America Line) Lewis Bldg. Portland, Oregon			x		
Northern Stevedores, Inc. Colman Bldg. Seattle, Washington	x	x			
Northland Transportation Co. Pier #56 Seattle, Washington	x	x			
Norton Lilly & Company 230 California Street San Francisco, California	x	x	x	x	x
Oceanic Steamship Company Room 312, Roosevelt Bldg. Los Angeles, California					x
Occidental Forwarding Co. 215 Market St. Room 529 San Francisco, California				x	
Ocean Terminals Pier #41 San Francisco, California	x			x	x
Oliver J. Olson & Co. 260 California Street San Francisco, California	x	x	x	x	x
Olympia Stevedoring Co. P.O. Box 192 Olympia, Washington	x	x			
Olympic Peninsula Steve. Co. Northern Life Tower Seattle, Washington	x	x			
Olympic Steamship Co., Inc. 64 Pine Street San Francisco, California	x	x		x	x
Oregon Stevedoring Co. 1020 N.W. Front Ave. Portland, Oregon	x		x		
Outer Harbor Dock & Wharf Co. Berth #53 San Pedro, California					x
Outport Stevedores Inc. P.O. Box 386 North Bend, Oregon	x		x		

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Pacific Atlantic SS Company (Quaker Line) P.O. Box 250 Vancouver, Washington	x	x		x	x
Pacific Argentine Brazil Line 618 N.W. Front Avenue Portland, Oregon			x		
Pacific Far East Line, Inc. 141 Battery St. San Francisco, California	x			x	x
Pacific Oriental Terminal Co. Pier 23 San Francisco, California				x	
Pacific Mail Steamship Co. 311 California Street San Francisco, California	x			x	
Pacific Ports Service Corp. (Norton, Lilly & Co.) 230 California Street San Francisco, California	x		x	x	x
Pacific Republic Line (Moore-McCormack Lines Inc.) 140 California Street San Francisco, California	x	x	x	x	x
Pacific Transport Lines, Inc. 244 California Street San Francisco, California	x			x	
Pacific Stevedoring & Ballast Co. Transport Bldg. San Francisco 5, California	x			x	
Pacific World Shipping Company 3630 N.W. Front Portland, Oregon			x		
Panama Pacific Line 141 Battery St., 6th Floor San Francisco 11, California	x			x	x
Parr Richmond Terminal Corp. No. 1 Drumm Street San Francisco, California				x	
Pope & Talbot Lines (Pope & Talbot, Inc.) 320 California Street San Francisco, California	x	x	x	x	x

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Portland Stevedoring Company 1730 N.W. Quimby Portland, Oregon	x		x		
Port of Los Angeles Stevedoring & Ballast Co. 322 East 22nd Street San Pedro, California					x
Prince Line, Ltd. (Furness, Withy & Co. Ltd. Agts.) 239 California Street San Francisco 11, California	x			x	x
Puget Sound Stevedoring Co. Bell St. Terminal Seattle, Washington	x	x			
J. Ramselius Room 308, 16 California St. San Francisco, California	x			x	x
Rothschild-International Stevedoring Company Northern Life Tower Seattle, Washington	x	x			
Royal Mail Lines, Ltd. (Holland America Line) 825 Central Bldg. Los Angeles, California	x	x	x		x
Salen Line (Interocean SS Corp. Agts.) 311 California Street San Francisco, California	x			x	x
San Francisco Steve. Co. 35 Brannan St. San Francisco, California	x			x	
Santa Ana Steamship Company 519 Colman Building Seattle, Washington	x	x			
Schafer Bros. SS Lines 1 Drumm Street San Francisco, California	x		x	x	x
Schirmer Stevedoring Co. Ltd. 55 Sacramento Street San Francisco, California	x			x	
Seaboard Stevedoring Corp. Pier 48 A San Francisco, California				x	x

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Seaboard Steve. Corp. of Wash. (Norton, Lilly & Co.) 1017 Board of Trade Bldg Portland, Oregon			x		
Seattle Marine Handling Co. Pier 56 Seattle 1, Washington		x			
Shaffer Terminals, Inc. P.O. Box 1157 Tacoma, Washington		x			
C. F. Sharp & Co., Inc. Central Tower 703 Market Street San Francisco, California	x	x		x	
Shepard Steamship Company 369 Pine Street San Francisco, California	x	x	x	x	x
Southern Terminals Co. Pier A Long Beach, California	x				x
States Steamship Company P.O. Box 250 Vancouver, Washington	x		x		x
State Terminal Co., Ltd. Marvin Bldg., 24 California St. San Francisco, California				x	
Sudden & Christenson, Inc. (Arrow Line) 310 Sansome Street San Francisco, California	x	x	x	x	x
Tait Stevedoring Co. Arctic Bldg. Seattle, Washington	x	x			
Terminal Operators, Inc. 311 California Street San Francisco, California				x	
Transatlantic Steamship Co. Ltd. (Gen. SS Corp. Ltd., Agts.) 465 California Street San Francisco, California	x	x			x
Transmarine Navigation Corp. 215 West 6th Los Angeles, California				x	x

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
Transpacific Transportation Co. (Java Pacific Line) 351 California Street, 8th Floor San Francisco, California	x	x	x	x	x
Twin Harbor Stevedoring Co. Eighth Street Hoquiam, Washington	x	x			
Union Steamship Co. of N.Z. 230 California Street San Francisco, California				x	
Steamers Service Company 1050-4th Avenue So. Seattle, Washington		x			
Union Sulphur Co., Inc. 816 Smith Tower Seattle, Washington	x	x	x	x	x
United Fruit Company 1001 Fourth St. San Francisco, California	x	x		x	x
United Greek Shipowners Assn. (Pacific Mediterranean Line) (Gen. Steamship Corp. Ltd.) Stuart Bldg. Seattle, Washington	x	x	x	x	x
United Stevedoring Company 1 Drumm Street San Francisco 11, California	x			x	
Viking Steamship Company 311 California Street San Francisco, California	x				
Virginia Dock & Trading Co. Pier 63 Seattle, Washington		x			
Washington Stevedoring Co. Alaska Bldg. Seattle, Washington	x	x			
Frank Waterhouse & Co. of Canada Ltd. Colman Bldg. Seattle, Washington	x	x			
West Coast Terminals, Inc. 465 California Street, Room 1115 San Francisco, California	x		x	x	x

Name and Address of Company	Membership List		WEOC	WEAC	
	WEA	WEW		Northern Calif.	Southern Calif.
West Coast Trans-Oceanic Steamship Line 510 S.W. Third Avenue Portland 4, Oregon	x		x		
West Oregon Terminals 817 Board of Trade Bldg. Portland 4, Oregon	x		x		
Western Stevedore Company 96 Columbia St. Seattle, Washington	x	x			
Western Terminal Co. 341 Embarcadero San Francisco, California				x	
Westfal-Larson Company Line 465 California Street San Francisco, California	x	x			x
Weyerhaeuser Steamship Co. 311 California Street San Francisco, California	x	x	x	x	x
Willapa Harbor Stevedoring 119 W. Ellis St. Raymond, Washington	x	x			
Williams, Dimond & Co. 262 California Street San Francisco, California	x	x	x	x	x
Yerba Buena Corporation 311 California St. 406 Robert Dollar Bldg. San Francisco 4, California	x			x	

APPENDIX B

Notice to All Officers, Representatives, Agents, and Members of International Longshoremen's and Warehousemen's Union, International Longshoremen's and Warehousemen's Union, District No. 1; Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, Each Affiliated With International Longshoremen's and Warehousemen's Union, Affiliated With the Congress of Industrial Organizations

Pursuant to the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not give effect to those provisions of the collective bargaining contract, or to any extension, renewal, modification, or supplement thereto, or to any superseding contract, between the ILWU and Waterfront Employers Association of the Pacific Coast, on behalf of itself, and the other regional Associations, the said regional Associations, and their respective members, dated December 6, 1948, covering the appropriate unit of longshoreman; the collective bargaining contract, between the ILWU, acting on behalf of the above-named locals, and Waterfront Employers of the Pacific Coast, on behalf of Waterfront Employers Associa-

tion of California, and Waterfront Employers of Oregon and Columbia River, dated January 17, 1949, and the port supplements, dated March 11, 1949, and March 25, 1949, respectively, covering ship clerks and checkers in the respective port areas, which expressly, or in their performance, require membership in the said Unions or any of them, or prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the proviso to Section 8 (a) (3) of the Act.

We Will Not refuse to bargain collectively as the exclusive bargaining representative of the unit of longshoremen, and the separate units of ship clerks and checkers, found to be appropriate in the Intermediate Report and Recommended Order in Cases Nos. 20-CB-19, 20-CB-38, with the Waterfront Employers Association of the Pacific Coast, on behalf of itself, Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, respectively, on behalf of the Employers as shown on Appendix A, attached thereto, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

We will not require, instruct, or induce our representatives or agents to require or insist upon the inclusion in any agreement between us and the Employers of any provisions which expressly, or in their performance, require membership in said Union as a condition of employment, or prevent the Employers from securing or retaining employees upon a non-discriminatory basis, except in accord-

ance with the proviso in Section 8 (a) (3) of the Act.

We Will Not direct, instigate, encourage, approve or ratify strike action taken by employees for the purpose of requiring that the Employers execute, or acquiesce in the demands of the Union for the performance of contracts, or provisions therein, which expressly, or in their performance, require membership in the Union as a condition of employment, or which would prevent the Employers from securing or retaining employees on a non-discriminatory basis, except in accordance with the provisions of Section 8 (a) (3).

We Will Not cause or attempt to cause the Employers to discriminate in any manner against employees, in violation of Section 8 (a) (3) of the Act.

Dated

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, C.I.O.

By,
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1

By,
(Representative) (Title)

SHIP CLERKS ASSOCIATION,
LOCAL 34,

By,
(Representative) (Title)

MARINE CLERKS ASSOCIA-
TION, LOCAL 1-63,

By,
(Representative) (Title)

SUPERCARGOES AND CHECKERS UNION,
LOCAL 40,

By,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CB-19

In the Matter of:

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, Affiliated
With the CONGRESS OF INDUSTRIAL
ORGANIZATIONS

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

Case No. 20-CB-38

In the Matter of:

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34, and LOCAL 34;
MARINE CLERKS ASSOCIATION, LOCAL
1-63, and LOCAL 1-40, Each Affiliated With
INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION, CIO

and

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST

Wednesday, September 1, 1948

Pursuant to notice, the above-entitled matter
came on for hearing at 10:15 o'clock, a.m.

Before: Irving Rogosin, Esq., Trial Examiner. [1*]

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

Appearances:

REEVES R. HILTON,
Washington, D. C.;

DAVID E. DAVIS,
San Francisco, California,

Appearing on Behalf of the General
Counsel, National Labor Relations
Board.

BROBECK, PHLEGER & HARRISON, by
SAMUEL L. HOLMES,

111 Sutter Street,
San Francisco, California,

Appearing on Behalf of Waterfront
Employers Association of the Pa-
cific Coast.

GLADSTEIN, ANDERSEN, RESNER &
SAWYER, by

NORMAN LEONARD,
240 Montgomery Street,
San Francisco, California,

International Longshoremen's and
Warehousemen's Union Affiliated
With the Congress of Industrial Or-
ganizations. International Long-
shoremen's and Warehousemen's
Union, District No. 1, Acting on
Behalf of Ship Clerks Association,
Local 34, and Local 34; Marine

Clerks Association, Local 1-63, and Local 1-40, Each Affiliated With International Longshoremen's and Warehousemen's Union, CIO, Respondents. [2]

* * *

PROCEEDINGS

Mr. Hilton: If the Examiner please, as General Counsel Exhibit No. 1, I would like to offer in evidence the Complaint together with copies of amended charges issued on August 20, 1948, against the International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, being Case No. 20-CB-19, and consolidated with International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Local 1-40, each affiliated with the International Longshoremen's and Warehousemen's Union, CIO, being Case No. 20-CB-38. Pursuant to the order of the General Counsel the cases were consolidated, and a complaint issued pursuant thereto.

Also, a copy of the Order consolidating cases and Notice of Hearing setting this matter for hearing today, September 1, 1948, at 10:00 o'clock in the forenoon at Room 634, 821 Market Street. [9]

(Thereupon the documents above referred to were marked General Counsel Exhibit No. 1 for identification.)

Mr. Hilton: As General Counsel Exhibit No. 1-A, Affidavit of Service of Complaint and Order Consolidating cases and Notice of Consolidated Hearing signed by V. Bass, an employee of the Twentieth Region of the National Labor Relations Board, showing service by registered mail, date of mailing on August 20, 1948. Attached to the exhibit are return receipts, United States Post Office registered mail, showing service of the Complaint and Notice of Hearing upon the respondents that I have named.

(Thereupon the document above referred to was marked General Counsel Exhibit No. 1-A for identification.)

Mr. Hilton: I should also at this time like to ask if counsel for the Waterfront Employers Association did receive a copy of the Complaint and Notice of Hearing?

Mr. Holmes: We did.

Mr. Hilton: I will show the exhibit to counsel for respondents.

Mr. Leonard: If I understand correctly, Mr. Hilton, General Counsel proposed Exhibit No. 1 consists of the Complaint which is before me, charges or amended charges that are attached to it, and the Order.

Mr. Hilton: Order of Consolidation and Notice of Hearing.

Mr. Leonard: And 1-A is this Affidavit of Service with [10] the attached receipts. [11]

General Counsel Exhibit No. 1 and 1-A for identification may be received and so marked.

(The documents heretofore marked General Counsel Exhibit No. 1 and 1-A for identification were received in evidence.)

* * *

Trial Examiner Rogosin: Very well, Mr. Leonard.

Mr. Leonard: Section 10 (b) of the Statute provides that [12] no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. In other words, the Board has no jurisdiction to issue a complaint prior to the service of a copy of the charge on the person against whom the charge is made.

The proffered exhibit, or perhaps it has already been offered in evidence, the General Counsel Exhibits No. 1 and 1-A indicate from a very cursory examination of those papers—and this is the first time we have seen the full formal file:

1. That certain charges marked “Additional Charges, Nos. 1, 2 and 3”—they are so marked in the file—were never served upon any of the respondents. There is no affidavit of service that those charges were served. My information is that they never were served.

The only affidavit of service of any charge is the affidavit of service of a document marked

"Amended Charge" served upon one of the respondents, the International Longshoremen's and Warehousemen's Union.

The affidavit of service which is in the file about which I asked Mr. Hilton indicates on its face that it was served August 24, 1948. The complaint indicates on its face it was issued August 20, 1948. Obviously, the amended charge that was served upon the party charged or against whom the [13] charge was made was some four days after the issuance of the complaint.

Going back to Section 10 (b), reading the language of the statute itself, it seems to me that it is perfectly obvious that the Board had no jurisdiction to issue the complaint prior to the time it served the charge upon the respondents International Longshoremen's and Warehousemen's Union. Consequently, the Trial Examiner has not authority to proceed in view of the fact that the complaint was prematurely issued.

As I say, with respect to the balance of the respondents, those named in Case No. 20-CB-38, there is no proof of any service of any charge upon them at any time.

So, for those reasons I make the point that the Complaint was improperly issued, that the service contemplated by Section 10 (b) of the statute was not complied with, there wasn't any such service, and therefore the proceeding falls of its own weight at the very outset because there hasn't been the compliance with the statutory requirement which Congress made a condition precedent to the issu-

ance of a complaint and the hearing which [14] follows.

* * *

The second point we make, in support of our motion to dismiss, is one which, in effect, I have already made; that is, that the first amended charge, upon which the Complaint in Case No. 20-CB-19 is based, was not served upon the Respondents, and particularly upon the Respondent ILWU, prior to the issuance thereof, contrary to the provisions of Section 10(b) of the Act.

Since I have prepared this written motion to dismiss I had an opportunity this morning, for the first time, to examine the formal file and I want to add to that portion of the motion to dismiss an additional matter, and that is to say that the first additional, second additional, third additional charges, which purportedly run against Respondents mentioned in Case No. 20-CB-38, were never served upon those Respondents prior to the issuance of the Complaint, as required by Section 10(b) of the Statute. [19]

* * *

Mr. Hilton: The Affidavit of Service and the Consolidated Complaint, which was served on each of the Respondents, contained a copy of the Amended Charge involving the ILWU, Case No. 20-CB-19, and also attached to the Complaint and Notice of Hearing copies of the charges filed in Case No. 20-CB-38.

Is that correct?

Mr. Leonard: I don't know, to be perfectly

frank with you. On the face of the exhibit there is no proof of service. [24]

* * *

Mr. Hilton: We are proceeding under the amended charge. The fact is that a copy of the original charge was included in the formal papers without my knowledge. It shouldn't be there. [28]

* * *

Mr. Hilton: The Rules and Regulations of the Board provide, and this is Section 203.14:

“Upon the filing of a charge, the Charging Party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The Regional Director will, as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.”

Now, we have issued a Complaint based upon the amended charge in Case No. 20-CB-18. That charge, which shows it is an amended charge, obviously is predicated upon a first charge having been filed, or an original charge having been filed. So that when we served the Complaint, together with the Notice of Hearing, and a copy of the amended charge, the Board has certainly met all requirements insofar as giving a copy of the amended charge to Respondents is concerned.

With respect to Case No. 20-CB-38, they are charges which were filed on August 20, 1948, relat-

ing to certain classifications of clerks. Now, there again, of course, the provisions of Section 10(b) and the Rules and Regulations of the Board [30] are applicable. Strictly speaking, there is no legal duty on the General Counsel's Office, or on the Regional Director, to serve a copy of those charges upon Respondents.

Now, we served copies of the charges in 20-CB-38 upon each of the Respondents. They were attached to the Complaint and Notice of Hearing, and the Affidavit of Service shows that they were actually served upon each of the Respondents. The charge, of course, is simply jurisdictional.

Again, viewing this from a practical standpoint, the original charge was filed in June of 1948 and certainly there can be no complaint that no investigation was made on those charges, the issuance of the amended charge in Case No. 20-CB-19, as well as the new case in 20-CB-38, all of which related to matters that had been thoroughly and fully investigated over a period of more than two months, and does not in any manner prejudice the rights of these Respondents in this hearing.

Therefore, the Motion to Dismiss on those grounds is wholly without merit. [31]

* * *

Mr. Leonard: I certainly don't want to be unduly difficult about these matters. On the other hand, they are jurisdictional. I have a responsibility to the Respondents to protect their interests. So far as they were notified, at the time they were

served with a copy of the Complaint and the charges herein, the charges that were attached to the Complaint didn't appear that any of their acts set forth in Paragraph VI, which were the basic section of the Complaint, had any effect upon interstate commerce. [67]

* * *

Trial Examiner Rogosin: That may be done. Respondent's Answer may be marked General Counsel's Exhibit 1-D for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-D for identification.)

Trial Examiner Rogosin: It may be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 1-D for identification was received in evidence.) [74]

* * *

JAMES A. ROBERTSON

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [81]

Direct Examination

* * *

Q. (By Mr. Hilton): Now, directing your attention to General Counsel's Exhibit No. 48, when was the Waterfront Employers Association incorporated? A. June 22, 1937.

(Testimony of James A. Robertson.)

Q. And under the laws of what State?

A. California.

Q. What kind of a corporation is it? [85]

A. Non-profit corporation.

Q. And does it have officers? A. It has.

Q. Can you tell us who the officers are?

A. President, Mr. F. P. Foisie; Vice President, H. W. Clark; Treasurer, K. F. Saysette; Secretary, J. A. Robertson.

Q. Now, directing your attention to General Counsel's Exhibit No. 48, what are the purposes of the corporation?

A. The corporation is for the administration and negotiation of labor agreements, labor relations.

Q. Do you have any members of this Association? A. We do.

Q. Who is eligible to membership in the corporation?

A. Steamship companies who carry freight, cargo, by water; stevedoring companies who employ longshoremen; terminal companies, and agents of steamship companies. I believe that covers the categories.

Q. Where are these employers located?

A. They operate in and out of Pacific Coast ports.

Q. In what states?

A. Oregon, Washington, and California.

Q. How many members do you have in the cate-

(Testimony of James A. Robertson.)

gories you have named who are members of your organization as of this time? A. 129.

Q. Approximately how long have you had 129 members? [86]

A. I don't think I can answer that question.

Q. Well, the membership you now have, 129 members, could you say approximately how long these members have been in the Association, directing your attention to approximately January of 1948?

A. I don't think there would be any change. There might be differences, but the number might be about the same.

Q. I believe you stated the purpose of the organization was to represent employers for the purposes of collective bargaining?

A. That is correct.

Q. That is the employer members of your Association, is that correct? A. That is right.

Q. Now, what authority, if any, does the Association have to represent these employers?

A. It has full authority.

Q. Well, how is that designated?

A. We follow the policies set down by the Board of Directors. When agreement is reached, it is signed on behalf of the members by the Association.

Q. Do you know how long this Association has been acting as the collective bargaining agent for its employer members?

A. Since it was incorporated.

Q. When was that? [87]

(Testimony of James A. Robertson.)

A. '37, June of '37.

Q. Do you know whether or not it has been continuous since 1937? A. It has.

Q. Can you tell us just how the Waterfront Employers Association handles the negotiations with various labor organizations?

A. Could you clarify that question?

Q. How are the negotiations actually handled by the Waterfront Employers Association? Do you have committees, or how do you operate?

A. The Board of Directors meet and decide upon the policy. The Negotiating Committee is usually appointed, which consists of officers of the corporation, which meet with the union with which we deal, and agreement is attempted.

Q. In the event that this committee comes to an agreement with the committee representing the union, what does the committee do then, representing the employers? Do they report back, or do they sign the agreement, or just what do they do?

A. They sign the agreement.

Trial Examiner Rogosin: The Negotiating Committee or the Board of Directors?

The Witness: No, the Negotiating Committee. Actually it is the officers of the corporation.

Q. (By Mr. Hilton): Do you know with what labor organization the Waterfront Employers Association had been dealing in the [88] past years?

A. The International Longshoremen's and Warehousemen's Union, CIO.

Q. Covering what employees?

(Testimony of James A. Robertson.)

A. Coast longshore, longshoremen.

Q. Directing your attention to Paragraph IV of the Complaint which is in evidence as General Counsel's Exhibit No. 1, I will ask you if that is the group of employees with which the Waterfront Employers Association has been bargaining?

A. That is correct. They are named in the current agreement, as I recall.

Q. Do you have any other employer organization other than the Waterfront Employers Association of the Pacific Coast?

A. There is the Waterfront Employers Association of California, Waterfront Employers of Oregon and Columbia River, Waterfront Employers of Washington. [89]

* * *

Q. What kind of an organization is the Waterfront Employers Association of California?

A. That is an Association of employers of longshoremen, carloaders, ships clerks, and so on.

Q. I mean what type of an organization is it?

A. It's the same type as the Coast Association.

Q. Is it a partnership or a corporation or just what is it?

A. It's a corporation.

Q. It is incorporated under the laws of what state?

A. California.

Q. The exhibit which you now have in your hand as General Counsel Exhibit No. 49 for identification, is that the current constitution and by-laws of the Association?

A. It is.

(Testimony of James A. Robertson.)

Q. Do you know how long the present constitution and by-laws have been in effect?

A. The California Association was incorporated in November, November 1, 1943, and I know of no change to my knowledge.

Mr. Hilton: I would like to offer this in evidence as General Counsel's Exhibit No. 49.

Mr. Leonard: May I ask the witness just one question, please?

Trial Examiner Rogosin: You may.

Mr. Leonard: Mr. Robertson, I think you testified right [90] at the outset that you were Secretary of the Waterfront Employers Association of the Pacific Coast and of the Waterfront Employers Association of California; is that right?

The Witness: That is correct, sir.

Mr. Leonard: So that your testimony concerning this General Counsel's Exhibit 49 for identification is based upon your knowledge as Secretary of the California Association?

The Witness: That is correct.

Mr. Leonard: No objection.

Trial Examiner Rogosin: General Counsel's Exhibit 49 for identification may be received and so marked.

* * *

Q. (By Mr. Hilton): Directing your attention to General Counsel's Exhibit No. 49, what are the purposes of the corporation?

A. The negotiation and administration of labor agreements on behalf of the employer members.

(Testimony of James A. Robertson.)

Q. Covering what area?

A. It covers the State of California.

Q. Principally what ports in the State of California?

A. Principally the Bay Area and Los Angeles, Long Beach Harbor areas.

Q. You say the Bay Area. You mean the San Francisco Bay Area? [91]

A. Correct.

Q. Has this Association executed collective bargaining agreements with various labor organizations over a period of years?

A. It has.

Q. Do you know how long it has been acting as a representative for employer members in dealing with labor organizations?

A. The California Association, of course, as such, and I am now testifying to that, was just since '43. Prior to that time you had two separate Associations, one the Waterfront Employers Association of San Francisco, and the other, Waterfront Employers Association of Southern California. This was a merger.

Q. This was the merger, is that right?

A. That's right. So it is one Association now. Now, I do not know how long they have been dealing with labor organizations.

Q. What, if any, connection does the Waterfront Employers Association of California have to the Waterfront Employers Association of the Pacific Coast?

A. Most members of the California Association belong to the Coast Association. The President,

(Testimony of James A. Robertson.)

Vice President, Treasurer and Secretary are the same of both Associations.

Q. I believe you stated that the Waterfront Employers Association of the Pacific Coast acted as a policy making organization. Am I correct in that, insofar as collective bargaining agreements are concerned? [92]

A. The way that works, of course, is that the Coast Longshore Agreement—which is traditional, I believe—negotiate with the ILWU on the Longshore Agreement. The policy reached in that agreement sets the pattern for the others.

Trial Examiner Rogosin: The policy is set under the Pacific Coast Agreement?

The Witness: Yes. Once agreement is reached in the Longshore Agreement, it is just a matter—it doesn't necessarily follow, there might be a few points which have to be settled locally.

Q. (By Mr. Hilton): Does the Waterfront Employers Association of California have any agreements covering the longshoremen?

A. Not longshoremen.

Q. Do they cover units other than the longshoremen?

A. They have agreements covering carloaders and ship clerks.

Trial Examiner Rogosin: Which Association is this?

The Witness: California. [93]

(Testimony of James A. Robertson.)

Q. (By Mr. Hilton): I hand you what has been marked for identification as General Counsel's Exhibit No. 50 and ask you if you can identify that document?

A. This is the Articles of Incorporation and By-laws of the Waterfront Employers of Oregon and Columbia River.

Q. Are you an officer of that Association?

A. No, I am not.

Q. Do you have any personal knowledge as to the organization of the Waterfront Employers of Oregon and Columbia River?

A. I have personal knowledge, yes, sir.

Q. How is that knowledge obtained?

A. Visits to the port.

Q. Well, let me ask you this: Is the relationship between the Waterfront Employers Association of the Pacific Coast and the Waterfront Employers of Oregon and Columbia River the same as the relationship between the Coast Association and the California Employers Association?

A. It is. The relationship is the same.

Q. Do you know what kind of an organization the Waterfront Employers Association of Oregon is?

A. A corporation, non-profit. [95]

Q. Do you know the laws under which State it was incorporated?

A. State of Oregon.

Q. Do you know when it was incorporated?

A. December 12, 1934.

Q. Were any amendments made to the Articles of Incorporation?

(Testimony of James A. Robertson.)

A. To my knowledge the only amendment was a change in the name from the Waterfront Employers of Portland to the Waterfront Employers of Oregon and Columbia River, which took place April 1, 1948.

Q. Would you state now for the record the original name under which the corporation was incorporated?

A. The Waterfront Employers of Portland.

Q. When did you state the name of the corporation was changed? A. April 1, 1948.

Q. Can you tell us the functions of the Waterfront Employers of Oregon and Columbia River?

A. They have exactly the same functions as the Waterfront Employers of California, negotiating and administering labor agreements covering car-loaders, ship clerks. [96]

* * *

Q. (By Mr. Hilton): Now, Mr. Robertson, I believe you stated that some of your employer members are engaged in the steamship business; is that correct? A. That is correct.

Q. Could you tell us the type of business these companies are engaged in?

A. They handle cargo by water from Pacific Coast ports to all over the world, passengers also.

Q. What kind of cargo is handled, or what particular kind of cargo do these vessels carry?

A. General cargo, dry cargo, wheat, so on; everything but oil. I don't think there are any tankers belonging. [99]

(Testimony of James A. Robertson.)

Q. You have no tanker companies as employer members in the Association, is that correct?

A. Not that I know of.

Q. I believe you stated these companies operate from ports on the Pacific Coast to foreign ports; is that correct?

A. That's correct.

Q. How about the coastwise trade?

A. Well, they have trade with Alaska, Hawaiian Islands, with the East Coast, South America.

Q. Could you give us the names of a few of those companies?

A. Well, there is American Hawaiian, American President Line, Matson Navigation Company, Pacific Transport Lines.

Q. I believe you stated there were stevedoring employers as members of the Waterfront Employers Association of the Pacific Coast; is that correct?

A. Contract stevedores, yes.

Q. Can you tell us just briefly the nature of the stevedoring business in which these employers are engaged?

A. They are engaged in loading and unloading cargo in the ships.

Q. Where does the cargo come from, that is, cargo coming in on the vessels? Where would that come from?

A. You mean——

Q. When they unload the cargo off the ship, where does that cargo come from? It is coming into the State. Do you know [100] where it comes from?

A. I am afraid I don't get your question yet.

(Testimony of James A. Robertson.)

It comes off the ship on to the dock, is put in the terminal.

Q. Where does the ship carry the cargo from?

A. Oh, Hawaii, China, Australia, Alaska, South America, coffee.

Q. These vessels cover world routes, do they not?

A. That is correct.

Q. How about cargo that is being loaded on to the vessels? Where does that come from? How does it arrive at the dock?

A. Railroad car or by truck.

Q. What happens after it arrives at the dock or the terminal?

A. Well, if the ship is there it might be placed directly on the ship. If the ship isn't there it will be placed on the floor of the dock waiting for shipment.

Q. Where does that cargo go once it is loaded on the ship? Where does the ship go?

A. Well, they can go to China, Australia, Hawaii, Alaska, East Coast ports.

Q. How about the terminal companies? Can you tell us just briefly the nature of their operations?

A. Well, they receive and deliver and store cargo.

Q. You say they receive cargo. Where do they receive the cargo from? Would you explain that a little more?

A. Well, they receive it from a shipper who is going to send a load of apples off to China, and he will consign it to a [101] certain ship. It comes

(Testimony of James A. Robertson.)

down to the terminal, the terminal accepts delivery for the ship. The stevedore comes around, picks up the apples, puts the apples in the ship, the ship carries it over to China.

Q. How about on delivered cargo?

A. The stevedore takes it off the ship, puts it in the terminal, and then the consignee sends down the truck and picks it up, or it goes on railroad cars for the consignees other than in town.

Q. Now, the terminals are located on the docks, are they not? A. That is correct.

Q. Are some of the employer members of the Association engaged in all three types of businesses that you have described? A. They are.

Q. Do you have any employer members who are engaged in both the stevedoring and terminal operations? A. Yes, we have.

Q. Then are there others that are just engaged exclusively in stevedoring operations and others engaged exclusively in terminal operations? [102]

A. Yes, I think you could find just about every combination you want.

Q. Do you know the tonnage that was handled along the Pacific Coast for the year 1947?

A. I would say it was approximately 21 million tons.

Q. How do you arrive at that figure? You say you would put it at 21 million tons.

A. That is on the basis of assessments paid the Association.

Q. Are assessments paid on a tonnage basis?

(Testimony of James A. Robertson.)

A. That is correct.

Q. Of the 21 million tons of cargo handled do you have any figures as to show the percentage of cargo that was moved in states or to ports other than say the State of California—I will withdraw that. That is rather confusing.

Of the 21 million tons of cargo handled do you know how much of that cargo, what percentage of that cargo came from states other than states on the Pacific Coast and went to ports other than the ports in that state? A. No, I do not.

Trial Examiner Rogosin: Did the witness indicate what year this was for?

Mr. Hilton: 1947.

Q. (By Mr. Hilton): Now, of the 21 million tons, that covers the operations that you have described on steamship, stevedoring and terminal companies, is that correct? [103]

A. That is correct.

Q. And it was handled by members of the Association, is that correct?

A. That is correct.

Q. Do you know approximately how many tons of cargo were handled from January to May, 1948?

A. No, I do not.

Q. May I ask this: Do you know approximately how many longshoremen are employed by the employer members of the Association?

A. That is a difficult question because we have got carloaders in there, too. They are interchangeable.

(Testimony of James A. Robertson.)

Say approximately 12,000.

Q. That is along the entire coast, is that correct?

A. That is correct.

Trial Examiner Rogosin: Is that limited to long-shoremen or all types of employees?

The Witness: I would say that includes car-loaders.

Q. (By Mr. Hilton): Would that figure include clerks or checkers?

A. No, I don't think so. It would be about 15,000 if you included other groups, I believe. [104]

* * *

Cross-Examination

By Mr. Leonard:

Q. You stated as I recollect your testimony, that as of the present time there are 129 members of the Coast Association. You were able to testify to that matter, as I was able to see the record, without any reference to the exhibit. You knew that of your own knowledge?

A. That is right; yes.

Q. Do you know of your own knowledge how many of those 129 members fall within each of the four categories, steamship companies, stevedoring companies, terminal companies and agents?

A. There are 70 steamship companies and agents. I don't know the breakdown of the other groups. There are two classifications of member-

(Testimony of James A. Robertson.)

ship, not the four groups, the voting and associate members. [110]

* * *

Q. In other words, to take a specific example, if an agreement should be reached this afternoon or tonight in negotiations now going on, Mr. Foisie or you couldn't sign that without submitting to the 129 members? [120]

* * *

A. We would submit to the 129 members and then sign.

Q. I see. So that as of this moment, ten minutes before 4:00 today, the fact remains that the Association doesn't have the authority then to negotiate an agreement without first submitting it to the 129 members? A. No. [121]

* * *

Trial Examiner Rogosin: The hearing will be in order.

Mr. Hilton: Mr. Clark, will you take the stand?

HENRY W. CLARK

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilton:

* * *

Q. What is your occupation?

(Testimony of Henry W. Clark.)

A. I am General Manager of the Waterfront Employers Association. [150]

* * *

Q. (By Mr. Hilton): I will hand you what has been marked for [151] identification General Counsel's Exhibit No. 2, and ask you if you can identify that document.

A. Yes. That is the agreement between the Waterfront Employers Association of the Pacific Coast and the various ports, with the employers and the ILWU. It is familiarly known as the Coast Longshore Contract or Agreement.

Q. When did the agreement expire?

A. It expired as of June 15, 1948.

Q. Was that contract revised?

A. Since June 15, 1948, you mean?

Q. No, not 1948, you mean June, 1947, do you not?

A. Expired?

Q. It expired when? A. June 15, 1948.

Q. 1948? A. Correct.

Q. Now, were there any changes in the contract between the date of its execution and its expiration date?

A. None except the source of some awards possibly, which is provided for in the contract. [152]

* * *

Trial Examiner Rogosin: General Counsel's Exhibit No. 2 for identification may be received and so marked.

(Testimony of Henry W. Clark.)

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2

Agreement

June 6, 1947.

This Agreement, dated June 6, 1947, by and between the Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of California, Waterfront Employers of Portland, Waterfront Employers of Washington, hereinafter designated as the Employers, on behalf of their respective members, and the International Longshoremen's and Warehousemen's Union, hereinafter designated as the Union.

Witnesseth

The award of the National Longshoremen's Board dated October 12, 1934, as amended by agreements of February 4, 1937; July 15, 1938; October 1, 1938; December 20, 1940; October 31, 1945; March 18, 1946; March 19, 1946; July 16, 1946, and November 17, 1946, as interpreted by arbitrators in awards rendered thereunder, is hereby extended and renewed in form so amended as to read in the manner hereafter set forth. Said amended agreement shall become effective on June 16, 1947, and shall remain in effect until June 15,

(Testimony of Henry W. Clark.)

1948, and shall be deemed renewed thereafter from year to year unless either party gives written notice to the other of a desire to modify or terminate the same, said notice to be given at least sixty (60) days prior to the expiration date. Negotiations shall commence within ten (10) days after the giving of such notice.

Section 4. The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union and the respective employers' associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los Angeles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. A branch hiring hall shall be opened in the East Bay area of San Francisco harbor. All expense of the hiring halls shall be borne one-half by the International Longshoremen's and Warehousemen's Union and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the International Longshoremen's and Warehousemen's Union shall pay to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the International Longshoremen's and Warehousemen's Union.

(Testimony of Henry W. Clark.)

Section 6. Preference of employment shall be given to members of the Pacific Coast District International Longshoremen's and Warehousemen's Union whenever available. This section shall not deprive the employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.

* * *

In Witness Whereof, the parties hereto have executed this agreement on June 6, 1947.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION,

/s/ HARRY BRIDGES,

/s/ COLE JACKMAN,

/s/ MICHAEL JOHNSON.

WATERFRONT EMPLOYERS ASSOCIATION
OF THE PACIFIC COAST on Behalf of
WATERFRONT EMPLOYERS OF WASH-
INGTON, WATERFRONT EMPLOYERS
OF PORTLAND, WATERFRONT EM-
PLOYERS ASSOCIATION OF CALIFOR-
NIA and Their Respective Members,

/s/ F. P. FOISIE,

/s/ HENRY W. CLARK,

/s/ J. A. ROBERTSON.

Admitted September 2, 1948.

(Testimony of Henry W. Clark.)

Mr. Hilton: May I have this marked as General Counsel's Exhibit No. 2-A for identification? [153]

* * *

Q. Now, did there come a time when the Waterfront Employers Association served notice upon the ILWU with respect to the collective bargaining agreement it had and which you have identified as General Counsel's Exhibit No. 2? A. Yes.

Mr. Hilton: May I have this marked for identification as General Counsel's Exhibit No. 6?

(Thereupon the letter above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. Hilton): I hand you what has been marked for identification as General Counsel's Exhibit No. 6 and ask you if you can identify that?

A. Yes. This was a letter addressed to the ILWU on February 13, 1948, signed by Mr. Foisie, President of the Waterfront Employers Association of the Pacific Coast. The general gist of this letter is that we asked the union if they would meet with us to discuss the forthcoming expiration of our contract, and the necessary changes that we felt should be made to bring the contract into conformance with the law.

Q. Do you know whether or not the original of that letter was mailed to the ILWU? [185]

A. Yes, it was. [186]

* * *

(Testimony of Henry W. Clark.)

Trial Examiner Rogosin: General Counsel's Exhibit No. 6 for identification may be received and so marked.

(The letter heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.) [187]

GENERAL COUNSEL'S EXHIBIT No. 6

Waterfront Employers Association
of the Pacific Coast
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

(Copy)

February 13, 1948.

International Longshoremen's &
Warehousemen's Union,
104 Montgomery Street,
San Francisco 11.

Gentlemen:

Although the giving of formal notice of desire to modify our collective bargaining agreements may be deferred until April 15, 1948, we nevertheless feel it would be highly desirable to give early attention to the problem of conforming our agreements, when renewed, to the Labor-Management Relations Act of 1947.

As you know, the law prescribes as an unfair labor practice any discrimination, in respect to hir-

(Testimony of Henry W. Clark.)

ing, tenure or terms or conditions of employment encouraging or discouraging membership in a labor organization, and also prescribes any contractual provision or practice interfering with an employee's free choice in respect to membership in such an organization.

Our present Coast longshore agreement contains provisions relating to preference of employment and to control of registration and of the hiring halls which, in the opinion of our counsel, will be in violation of the law after June 15, 1948, the expiration date of our agreement. The port working and dispatching rules as well as various port labor agreements also contain provisions which should be changed to conform to the law.

So that we may adopt promptly changes necessary to bring our agreements into harmony with the law, we request an early meeting and suggest one at your convenience in the coming week.

Very truly yours,

/s/ F. P. FOISIE,
President.

Admitted September 2, 1948.

* * *

Q. (By Mr. Hilton): Now Mr. Clark, after this letter, General Counsel Exhibit No. 6, was sent to the ILWU did you have any meetings with the ILWU? A. Yes, we did.

(Testimony of Henry W. Clark.)

Q. What kind of meetings were these? With what subjects did they relate to? [188]

A. Why, we had meetings which we asked them to conduct on a more or less informal basis. They were not formal negotiations as such with a record maintained, but we wanted to discuss conformance to the law because we felt there were certain changes necessary in our contract to conform to the Labor Management Relations Act. And we asked that we get those meetings started as far in advance of the formal opening date of the contract which was April 15 as possible, so that we might be able to clear those matters aside in ample time.

Q. So you say you did have informal meetings prior to the date on which the contracts could be reopened, is that correct? A. That is correct.

Q. Do you recall what dates you had these informal meetings?

A. Yes, I made a record for my personal use of the various meetings. We had a meeting on February 21 between the parties and again on March 23, again on March 29, again on March 31, and on April 5. I believe it was about that time that the parties exchanged formal notices of opening the agreement.

Then we had meetings again on April 15, April 16, and April 19.

Q. Now, did there come a time when the United States—strike that—when the Federal Mediation and Conciliation Service entered into this matter?

A. Yes. We had no meetings after April 19

(Testimony of Henry W. Clark.)

until May 11 when the Federal Mediation and Conciliation Service called the [189] parties together, and then we met with them afterward.

Q. How many meetings and on what dates did you have those meetings with the Federal Mediation and Conciliation Service?

A. We had, I believe, 15 meetings with the Federal Mediation and Conciliation Service. I think it was 15.

Q. Can you give us the dates?

A. Yes, May 11, May 18, May 19—we had two meetings on that day, one in the morning and afternoon, really you can call it one day—May 20, May 24, June 1st, June 17, June 28, June 29, June 30, July 1st, July 8, July 19, and on August 6 we had a meeting that was called for purposes of discussing the differences between the parties, but an incident had occurred which involved the tying up of ships, and we did not discuss the purpose for which the meeting was called but simply that incident.

Trial Examiner Rogosin: Would you mind giving me the dates of the meetings following July 1?

The Witness: Yes: July 1, July 8, July 19, and this last meeting I referred, August 6.

Trial Examiner Rogosin: I understood you to say that the subject matter of that meeting was something apart from the general collective bargaining negotiations.

The Witness: Well, it happened that some ships were tied up, and we addressed ourselves to the

(Testimony of Henry W. Clark.)

immediate question rather than the purpose for which the meeting was called. [190]

We have had meetings since that date very recently. Do you want the dates of those as well?

Q. (By Mr. Hilton): Yes, give us those too.

A. Another meeting on August 28, August 29, we had two meetings, I believe, on each of those days, that is morning and afternoon or afternoon and evening. August 28, August 29, August 30, August 31 and September 1st.

On those last few dates there have been several different occasions on which the parties met, but you might call them a recess of the meetings. For example, yesterday we met at three different times during the day. I think it was three, wasn't it? Morning, afternoon and evening. You might call it separate meetings if you wish to do so.

I think that is a complete list of the meetings that we have had. [191]

* * *

Mr. Hilton: Mr. Examiner, prior to the luncheon recess I had attempted to go into these meetings by groups, that is, the informal meetings which were held between February 21 and April 5. However, I do not think it feasible to do that and will have to go into this matter, as I see it, meeting by meeting, and the witness will refer to notes, which notes will be available to Counsel for the Respondents.

I have also talked with the Counsel for the Re-

(Testimony of Henry W. Clark.)

spondents, and I think it would be better and preferable to proceed on this basis, to cover the so-called informal meetings, and then let Counsel for the Respondent cross-examine on those meetings, that is, the meetings from February 21 to April 5, and the meetings between the parties from April 5 through April 19, cover that group, and then the group with the Federal Mediation and Conciliation, cover that group.

Is that all right with you?

Mr. Leonard: That is perfectly satisfactory. There is some general testimony which has already been taken, on which we will want to cross-examine, but that will, I take it, come out when you are completely finished. [214]

* * *

Direct Examination

(Resumed)

By Mr. Hilton:

Q. Mr. Clark, directing your attention to the meeting of February 21, will you tell us who was present at that meeting?

A. For the employers?

Q. Yes, for the employers.

A. Mr. Foisie, Mr. Bryan of the Shipowners, Mr. Robertson, and Counsel, Mr. Harrison and Mr. Plant.

For the union, Mr. Bridges, Mr. Schmidt, and Mr. Bodine, Mr. Johnson and Mr. Fairley.

Q. You yourself were present at the meeting?

(Testimony of Henry W. Clark.)

A. Yes.

Q. Who acted as spokesman for the Waterfront Employers Association? A. Mr. Harrison.

Q. Who acted as spokesman for the ILWU?

A. Mr. Bridges.

Q. Can you tell us just briefly what happened at this meeting?

A. The meeting was called pursuant to the letter of February 13, and Mr. Bridges stated that he did not agree with the letter, [215] and Mr. Harrison said that our position was that the contract did not satisfy the law and that we had to bring it into conformity.

Mr. Bridges said that it would be legal if it were renewed as it is.

Mr. Harrison suggested a joint letter to the NLRB for an interpretation and Mr. Bridges would not agree.

Then Harrison said the Board could initiate proceedings and as employers we could not violate the law. Then he asked if the union would eliminate the preference clause.

Bridges said that is one point on which they might conform, or that is one point that might not conform, he put it. He said something might be worked out. The union asked our suggestions.

Harrison asked him about control of the dispatching by the union, and there was discussion on that back and forth; Bridges asking if we didn't want a union man, and we said that union membership wasn't important, and he said we can't have a closed

(Testimony of Henry W. Clark.)

shop. The law requires no discrimination in registering and dispatching men, and that anything giving control to the union on those points would violate the law.

Bridges asked if that went to all dispatchers and we said it did. Then he asked for other objections.

Harrison said there may be other sections in the working dispatching rules, but our general position was there must be [216] no discrimination.

Bridges said that employer control of the hiring hall would be just a roof over the shape-up—the shape-up being the longshore term for the way longshoremen are hired on the East Coast—and said that no other working and dispatching rule was in conflict nor is the union dispatcher, and took the position that the only point was the interpretation of the preference clause. He suggested we leave things as is.

We said it was our duty to recognize the law.

Bridges again said it could be renewed legally without a change. He pointed out that his committee was without authority to take a definite position, which we recognized, of course. Bridges said he would not serve notice to open the agreement and asked if our letter was a formal notice of opening, and we said it was not; just informal discussions.

Then Bridges asked about the Lundeborg Formula. That was a formula worked out in connection with the Sailors Union of the Pacific, and he said that the union might consider it.

(Testimony of Henry W. Clark.)

Harrison said it was an open shop, and Bridges said, "If that is it, we don't want it."

Then he asked us to look over the working and dispatching rules and let them know which ones are in conflict. We said we'd do that.

Then he asked for our suggestions as to the hiring hall and the preference clause. Harrison said dispatchers not under [217] union control. Bridges said there is nothing in the law as to how personnel of the hiring hall is selected, that control of the hiring is a joint affair and dispatchers do not hire. Harrison said the dispatcher determined who is dispatched, the employers must hire the men who are dispatched. Bridges said in the act of registration the companies as a group agree to hire men in advance, men can be discharged for cause, and the employer does not have to hire the men dispatched.

Harrison said additions to the registration list must be non-discriminatory. Under the present set-up the union can refuse to register a man. Bridges saw nothing wrong with the present registration practice and said there are some men there now that the union objects to, and that in the event of disagreement it can be carried to an Arbitrator.

Harrison asked how progress could be made, said he was bothered by Bridges' statement first that renewal of the agreement was OK under the law, and second that the committee had no authority to speak at this time.

Bridges said he was calling a meeting of the Coastwise or Negotiating Committee at an early

(Testimony of Henry W. Clark.)

date, and his small group there would make recommendations to his full committee. He said that we might exchange letters as amendments to the contract and roll along on that basis, but making any changes in the hiring hall set-up would not be good.

Harrison asked him what changes will go to methods of hiring [218] and dispatching. Bridges said we couldn't accomplish that without trouble, and his position was to avoid trouble. Harrison said the employers also wished to avoid trouble, but to conform to the law, and that is the reason we sent a letter at that early date.

Bridges said that the employers would run into trouble in depriving the union selection of dispatcher and the preference clause. Harrison said not if the union adopts a union shop clause. Bridges said they didn't want that kind.

Bridges suggested we go over the contract as we had before, and that the union could not agree that the preference clause and the dispatching hall needed changes, but that preference might be subject to legal interpretation and might require a modification.

Harrison asked if the union would consider the employers' position on the preference clause. Bridges said he would in due course give the union's position to us.

That was the sum and substance of the meeting. [219]

(Testimony of Henry W. Clark.)

Cross-Examination

By Mr. Leonard:

Q. Mr. Clark, according to the record now, the first meeting that was held between your committee and the union people was this meeting of February 21, and you mentioned, among other people present for the employers, one J. B. Bryan, and his name appears on your notes as having been present. Would you please identify Mr. Bryan for us?

A. I thought I had done so. He is President of the Pacific American Shipowners. [244]

* * *

Q. Do you recollect whether Mr. Harrison had any response to make at that time to this proposal that the contract might well be permitted to renew itself automatically?

A. Yes. He said "Our agreement does not satisfy the law and we must bring it into conformity to the law."

Q. So would it be fair to say that the suggestion initiated by Mr. Bridges, that the contract be permitted to run on without modification or terminating it, was rejected by Mr. Harrison [246] pretty much at the outset?

A. To the extent of saying that we had to conform.

Q. And immediately thereafter, according to the minutes, Mr. Harrison raised the question with respect to whether or not the union would eliminate

(Testimony of Henry W. Clark.)

the so-called preference clause, that was raised by Mr. Harrison immediately?

A. Not immediately. He first suggested a joint letter to the NLRB for interpretation.

Q. That doesn't appear to be the chronology in the written minutes, but it is all right.

A. I believe so.

Q. Yes. You are right. I beg your pardon. At any rate, when the two groups got down to talking about specific provisions in the contract, Mr. Harrison raised the question as to whether or not the union would agree to eliminate the preference clause, is that right? A. That is correct.

Q. And Mr. Bridges, speaking for the union, indicated that the union would give this matter some consideration? A. That is right.

Q. In other words, it would be fair and correct to say that with respect to that matter Mr. Bridges indicated that the union was perfectly willing to bargain on this matter and was perfectly willing to make such changes as might be indicated, and upon which the parties might be able to reach an agreement? [247]

A. I don't believe he went to that extent. His position at this meeting—and it was changed, you will notice, in the notes later—he said simply that it was, that preference was one point that might not conform and something might be worked out, and he invited our suggestions.

Q. Were any suggestions forthcoming at that time in response to that invitation?

A. I don't believe so at this meeting.

(Testimony of Henry W. Clark.)

Q. Were some forthcoming at some later meeting?

A. Yes. I believe we did, and in some of our communications we indicated something on phraseology on preference. I don't remember whether there is anything here on it or not. (Examining notes.) I see nothing, unless you would say that Harrison's suggestion that the union shop might cover that point; nothing else on preference.

Q. There was no formal written proposal which was made by the employers at this time with respect to preference, at this meeting of February 21?

A. No.

Q. It is, however, your best recollection that at some subsequent meeting, or in the course of some correspondence by you—and I mean the Waterfront Employers Association—you did make a specific proposal to the union with respect to contract language concerning preference of employment?

A. I know the union made some proposal to us, brought out in [248] some of those written minutes there; and, yes, I believe there was a specific proposal by us with reference to the preference clause. [249]

* * *

Direct Examination
(Resumed)

By Mr. Hilton:

* * *

Q. Leaving aside the exhibit for a moment, going back to April 28, were you present at any

(Testimony of Henry W. Clark.)

meeting between the representatives of the Water-front Employers Association and the ILWU?

A. Yes, I was.

Q. I believe you stated that meeting was held in regard to Clerks, is that correct?

A. That is correct. [325]

* * *

Q. Can you tell us what occurred at that meeting?

* * *

A. Mr. Johnson of the union said that the last record was the union's letter of March 22, stating the union's disagreement with the grievance machinery proposed, and the Employers' refusal to include certain classifications.

Mr. Robertson said the Employers had replied to that and stood on their previous draft. [326]

I stated that the Coast Agreement, this proposed Coast Agreement would cover all subjects that were common. By that we were using the terminology of that Memorandum of Agreement, "substantially identical," and the balance would be contained in port supplements.

Mr. Bulcke then summed up attempts to negotiate the Coast Agreement had failed to date, the contract was opened and the union had made certain demands, and they asked for a reply.

I stated that our first concern was to conform the agreements to the law and we could go into other matters.

Bulcke asked if our reference to the preference

(Testimony of Henry W. Clark.)

of hiring halls was the same as in the Longshore negotiations, and we told him that was true.

Then Mr. Robertson pointed out those points were covered in port agreements, not the Coast, but that our position was as stated.

Mr. Johnson said that the union wanted new material covered in the Coast Agreement, and since these subjects at issue—the hiring halls, dispatchers, preference of employment—were to be re-negotiated, the union wanted them negotiated in a Coast-wide agreement.

I stated that those are still matters for the ports.

Johnson said the contracts are opened, demands made, and asked what we were going to do about it.

Then Mr. Bulcke for the union said that the union believed [327] that most of the language in the port agreements could be made uniform, leaving only real differences in practice to go in the supplements.

Johnson then reiterated the question as to whether preference, our stand on preference, was the same on Clerks as it was in Longshore, and we said it was. Johnson said that the situation as regards Clerks was different from Longshore because in San Francisco monthly Clerks were not on the registration list, and asked if registered Clerks were to have preference of employment.

Mr. Robertson for the Employers said that the same proposals that had been made in regard to registered Longshoremen would hold for registered Clerks.

(Testimony of Henry W. Clark.)

Johnson asked again about monthly Clerks. He said that if a monthly Clerk lost his job he was out of work.

Gregory for the Employers said that there was no change in the present San Francisco Agreement yet needed to protect monthly Clerks who changed their jobs.

Then Johnson asked about transfers and visitors and Mr. Gregory said that he thought a uniform procedure should be adopted, but that would require permission of the Port Labor Relations Committee before men went to a new port. That is, a clearance would have to be arranged from the port the man left as well as the port the man was going to.

Bulcke asked about the vacation proposals, and we stated [328] that that was a port by port matter. [329]

* * *

Mr. Hilton: Before I call any witnesses, or proceed any further, I would like at this time to file a Motion for Leave to Amend the Complaint.

Mr. Leonard: A copy of which has just been served on me.

Mr. Hilton: Yes, a copy of which has just been submitted and served on Mr. Leonard.

I would like to file the original and six copies of the motion with the Examiner, and I think they should be marked as General Counsel's Exhibit 1-E. [380]

* * *

Trial Examiner Rogosin: Well, I shall permit

you to file such motions as you require, and will regard them as having been seasonally filed irrespective of when the evidence is being offered, or tendered, at any time before the close of the hearing, and in the event that you require additional time for the purpose of preparation of such formal pleadings I shall, of [396] course, allow such reasonable time as you may require.

So the Motion to Amend the General Counsel's Complaint is hereby granted.

General Counsel's Exhibit No. 1-E for identification may be received and so marked. [397]

* * *

Trial Examiner Rogosin: Respondent's Supplemental Answer may be marked General Counsel's Exhibit 1-G and received. [425]

* * *

F. C. GREGORY

witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [445]

Direct Examination

By Mr. Hilton:

* * *

Q. How long have you been a member of the Coast Labor Relations Committee for the Longshoremen?

A. Well, the Coast Labor Relations Committee was set up under the contract of 1940, and I have been a member of it ever since its inception.

(Testimony of F. C. Gregory.)

Q. I believe you stated that part of your duties was the handling of collective bargaining agreements that had been executed between the various labor organizations and the Waterfront Employers Association? A. That is correct.

Q. Now I will hand you what is in evidence as General Counsel Exhibit No. 2-B which is the supplemental agreement or the Steam Schooner Agreement, and ask you if you can identify that?

A. Yes. That is a supplement to the Coastwise Longshore [447] Labor Agreement.

Q. Do you recall when the first supplemental agreement was entered into?

A. It was entered into just before the settlement of the 1936-37 strike, early in February of that year.

Q. What was the purpose of entering into a supplemental agreement covering the longshore work on steam schooners?

* * *

A. The award of the National Longshoremen's Board which was handed down October 12, 1934 which ended the 1934 strike was an open shop agreement. In the 1937 contract we were considering writing the preferential employment agreement but in order to preserve the status quo on the steam schooners it was necessary to have an exemption to that preferential employment agreement so that there would not be immediate fighting between the [448] cities and the longshoremen over the work. [449]

* * *

(Testimony of F. C. Gregory.)

Q. (By Mr. Hilton): Now, I believe you stated that the preference was given to certain employees under the Coast Longshore Agreement. What group of employees was preference to be given to?

A. Longshoremen. [450]

* * *

Q. (By Mr. Hilton): To what area if any did the Steam Schooner Agreement apply?

A. Well, it applied to all of the Pacific Coast ports in the United States for the type of ship that plied between those ports only, in the coastwise trade.

Q. I believe you stated that the first supplemental agreement was entered into about February of 1937. Is that correct?

A. That is correct. [451]

Q. Were subsequent agreements entered into continuously from that time?

A. Yes. The Steam Schooner supplement as originally drawn became a part of subsequent agreements up until 1940 or thereabouts, when there was a slight change in the language and the parties were changed. The original agreement was between the Shipowners Association of the Pacific Coast which is an association representing steam schooners. They later delegated the authority to the Waterfront Employers of the Pacific Coast who entered the agreement for them. That is the only change.

Q. Did the Waterfront Employers Association enter into agreements with the ILWU?

(Testimony of F. C. Gregory.)

A. They did.

Q. When was the last agreement entered into?

A. The last agreement was entered into in June, 1947.

Q. Was there any supplemental agreement entered into in June of 1946?

A. Yes. Let me see—yes, June, 1946, and then again in November of 1946.

Q. And I believe you stated there was an agreement entered into in June, 1947, is that correct?

A. Yes, sir.

Q. When did that agreement expire?

A. June 15, 1948.

Q. I believe you stated that the general purpose of the [452] agreement was to give protection to seamen employed on steam schooners, is that correct?

A. Well, I did make that statement. It was for the protection of the steam schooner employers because we were interested in steam schooner employers, and the peace between their crew and the longshoremen, and their ability to work their sailors was of primary interest to the steam schooner operators; not to the seamen. [453]

* * *

Q. When was the Coast Labor Relations Committee first established? [456]

A. It was provided for in the agreement of 1940, but was not established, that is, in December, 1940, but was not established until some time early in 1941. I don't recall the exact date.

(Testimony of F. C. Gregory.)

Q. Now, can you tell us how the Port Labor Relations Committee was established in October of 1934?

A. It was set up, as provided for in the Award of the National Longshoremen's Board, and while it was supposed to be composed of an equal number of employer and employee members, actually the first one consisted of six men from the union with three from the employers. It was set up in order to carry out the duties that were set forth in Section 10 of the Longshore Award.

Q. You refer to the Longshore Award. When was the Award handed down?

A. October 12, 1934.

Q. Directing your attention to May of 1934, what, if anything, occurred along the waterfront?

A. On May 9 a strike occurred in San Francisco and simultaneously thereafter in other ports on the Coast.

Q. And what employees were involved in that?

A. The longshoremen were involved in the original strike. Later that month the seafaring unions, sailors, firemen and cooks, went out. [457]

* * *

Q. (By Mr. Hilton): What was one of the issues in the strike of May, 1934? [462]

* * *

A. The hiring hall issue.

Q. (By Mr. Hilton): Now, did there come a time when the strike was settled?

(Testimony of F. C. Gregory.)

A. Yes, sir. It was settled on the 31st of July 1934.

Q. How was it settled?

A. It was settled by an agreement of both parties to submit the issues in arbitration to the Mediation Board which had been appointed previously by President Roosevelt.

Q. That is the Board that Mr. Leonard just referred to, is that correct?

A. That is correct. There was just one Board. It was first a Mediation Board, and finally secured the agreement of both parties to act as an Arbitration Board.

Q. Did that Board hand down any award?

A. Yes, it handed down the award of October 12, which has been referred to and which is the foundation of our present contract.

Q. What year? October 12 of what year?

A. 1934. [463]

* * *

Q. (By Mr. Hilton): After the Award was handed down on October 12, 1934, what, if anything, was done by the Labor Relations Committee?

Trial Examiner Rogosin: Which Committee are you referring to now? It seems we may get into some confusion here about whether or not you mean the Port or Coast Committee.

Mr. Hilton: The Port Committee. The Coast Committee was not established until 1940. I should have mentioned that.

A. The Longshore Labor Relations Committee

(Testimony of F. C. Gregory.)

sat almost daily, beginning with Tuesday, October 15, for the next two or three months, having various problems to iron out; among them the registration of Longshoremen in accordance with the Award of the Longshoremen's Board, which required that each port set up a registration list; and with the establishment of the dispatching hall, which was accomplished after the registration was completed and after premises could be secured and altered to take care of the situation. The hiring hall in San Francisco was not actually opened until March, 1935.

Q. (By Mr. Hilton): Now, were there hiring halls in existence at any of the other ports?

A. Yes. There had long been a hiring hall in Seattle, in Tacoma, in Portland, and in San Pedro, or in the Los Angeles area; and a few, which I am not absolutely sure about, in some of the smaller ports in the Northwest.

Q. But I believe you testified that in October of 1934 there [470] was no hiring hall in San Francisco?

A. That is correct. There was none until established by the Joint Labor Relations Committee.

Q. Now, I believe you stated that the hall actually opened in 1935, is that correct.

A. That is correct.

Q. Have you been in the hiring hall?

A. Yes, sir.

Q. Were you there frequently or infrequently, or what?

(Testimony of F. C. Gregory.)

A. Well, when we first started the hall in 1935 I was there practically daily. Since that time it has not been necessary for me to be there so frequently, but I am there, I would say as much as once a week.

Q. Can you tell us how the hiring hall functions?

A. The hiring hall is administered by the Labor Relations Committee. The men are registered by the Labor Relations Committee, given serial numbers, and the men who are actually dispatched out of the hall are given a little thing called a plug, a little round piece of fibre, upon which their registration number is stamped. The men who work out of the hiring hall—I say that because certain men, about 50 per cent of them, work in gangs which I will describe later—the men who work out of the hiring hall are called plugboard men because they put their little plugs containing their registration numbers in the holes in boards that are maintained in the hiring [471] halls. These boards are numbered, and they are divided off into various classifications.

We have a board for the hold men, a board for the dock men, a board for the jitney drivers, which is a colloquial term for tractor drivers, and for lift-truck drivers, for winch drivers, for extra gang bosses.

They are also divided into day and night board sections so if a man prefers day work he plugs in on the day board in his desired classification. If he desires night work, he plugs in the night board in his desired classification.

(Testimony of F. C. Gregory.)

The only persons who cannot pick the classifications which they may want are winch drivers, lift-truck drivers, and gang bosses. Those men have to have certain qualifications and be passed before they can plug in on those boards.

A man comes in and plugs in and the first man that plugs in in a certain classification gets the first job that is called under that classification.

The Dispatcher pulls the plugs in the same order in which they are placed in the board, calls out the jobs, and the man comes to the dispatching window and is given a slip on which his orders for a particular job are written, and he is dispatched and goes to his job and performs the work.

Q. I believe you stated that the first man who plugs in for a job in his particular classification is the first one called, is that correct? [472]

A. That is correct.

Q. I believe you also stated that the hiring hall is under the jurisdiction of the Port Labor Relations Committee, is that correct?

A. That is correct.

Q. Now how is the Dispatcher selected for the hiring hall?

A. The Dispatcher is elected by the local union in San Francisco for a period of one year. In other ports he is elected for six months' duration. In San Francisco, however, he has always been elected for one year and they are eligible to run again for dispatching the second year, but not after that.

Q. And the hiring hall that you have just de-

(Testimony of F. C. Gregory.)

scribed is that the hiring hall referred to in Section 5 of General Counsel's Exhibit No. 2?

A. That is correct.

Q. Now, I believe you stated that Longshoremen had to be registered before they could plug in on the board, or be assigned longshore work, is that correct?

A. That is correct.

Q. Now, I believe you stated that after the longshore Board Award, in October of 1934, you started on a registration list. Am I correct in saying that?

A. Yes.

Q. You say "we" started. Is that the Port Labor Relations Committee? [473]

A. That is the Port Labor Relations Committee in San Francisco. In other ports where there were hiring halls, they practically had their registration lists already, but in San Francisco we had to start from the beginning.

The Award of the Longshoremen's Board provided that any man who could prove that he had earned his livelihood on the waterfront in one year out of the preceding three years should be registered, so we—when I say "we" in this connection I mean the Labor Relations Committee, the employer and employee—drew up and had printed some application forms, and had a space allotted to us down in the Ferry Building where, for about three weeks, we kept a considerable crew of men to take registration applications of the men. Those applications were later gone over in detail by the Labor Relations Committee and acted upon. [474]

(Testimony of F. C. Gregory.)

Q. (By Mr. Hilton): I believe you stated that you had certain forms for registration prepared, is that correct? A. That is correct.

Q. Further, you stated that the qualifications for registration were that a man must show he was employed one year, or 12 months, as a Longshoreman in the preceding three years, is that [475] correct? A. That is correct.

Q. What three-year period did the Labor Relations Committee use as a basis for that determination?

A. We used the years 1931, 1932, and 1933.

* * *

Q. (By Mr. Hilton): I hand you what has been marked for identification as General Counsel's Exhibit No. 43 and ask you if you can identify that?

A. Yes. This is a copy of the application which was used at that time. [476]

* * *

Voir Dire Examination

By Mr. Leonard:

Q. With respect to this matter, did the Port Labor Relations Committee, at the time that the men were being registered after the October, 1934, Award, keep written memoranda and reports concerning the applications filed with it, and the number passed upon, and so on?

A. The applications were made in duplicate, and one copy is in my possession, and one copy in the

(Testimony of F. C. Gregory.)

union's possession, so there is no doubt of that record. The Committee did not seriously consider the applications as to rejection or admittance [477] until along in January of 1935, when they were all in, because they straggled in throughout the months of November and December. There was no surplus of Longshoremen so there was no great need for any protection of the men to include one who did not qualify. But the Committee did, during the month of January, and the early part of February intensively go through the lists.

Q. Did it keep records of its action with respect to the acceptance or rejection, written records?

A. It did—well, the action is contained principally in one report that was made by a subcommittee of two, one from the employers and one from the union, in which there were listed the men who were passed and the men who were rejected, and a few where there was a reserved position on for the General Committee to pass upon independently, where the subcommittee didn't make a recommendation.

Q. This report was in writing? A. Yes.

Q. Copies are available, copies are still extant?

A. I have a copy.

Q. And this report states the reasons for the rejections, in cases where there were rejection?

A. No—well, I would say it stated the reason, that is, the union objects, or the union challenges this man. It went no further than that.

The objections that the Waterfront Employers

(Testimony of F. C. Gregory.)

made were all [478] on the ground of the time served. We went all through the pay rolls and if a man had not put in the requisite time, we made that notation.

Trial Examiner Rogosin: You say you made that notation on the application of registration, or some other form?

The Witness: In some cases on the application, but it is in this report which covers the entire registration.

Q. (By Mr. Leonard): You say a copy of that report is available?

A. Yes. I have a copy of that report.

* * *

Trial Examiner Rogosin: How many applications were filed to your knowledge, Mr. Gregory?

The Witness: There were approximately 4,300, I think 4,317, because I just looked at the list to refresh my memory. [479]

* * *

Direct Examination

(Resumed)

By Mr. Hilton:

Q. I believe you stated there were approximately 4,300 applications similar to General Counsel's Exhibit No. 43. Is that correct?

A. That is correct.

Trial Examiner Rogosin: That is to say, applications which were filled out and signed and executed and submitted to the Joint Committee?

(Testimony of F. C. Gregory.)

The Witness: That is correct.

Q. (By Mr. Hilton): How many of the applications that you received—strike that.

Of the 4,300 men who applied to be placed on this registration, how many were actually placed on the registration list? [482]

* * *

A. There were approximately 3500 men who were originally passed by the committee. That was in February of 1935, prior to opening of the dispatching hall.

Q. (By Mr. Hilton): Now I believe you stated that there were some applicants who were not fully qualified. Is that correct? A. That is correct.

Q. By that you mean—what do you mean by “not fully qualified”?

A. They did not qualify in having earned their principal living during one year out of the three preceding as laid down in the Longshoremen's Board Award. That was the only qualification that was laid down in that Award.

Q. What if anything did the Labor Relations Committee do with respect to these men who were not qualified as you have stated?

* * *

A. On some of them, both the union and the employers were willing to accept them and they were finally registered. On the majority of them that were objected to by the union they were not registered, it being taken as a real principle by

(Testimony of F. C. Gregory.)

the two parties that mutual agreement had to be secured to register a man. [484]

Trial Examiner Rogosin: That is to say, to register a man who lacked adequate experience within the meaning of the Award?

The Witness: That is correct. There were some objections on the part of the union to men who actually had the full experience, but we insisted upon their registration and the union acquiesced.

Q. (By Mr. Hilton): What if any designation was given to this group of men which you have stated——

Mr. Leonard: Before that question is answered may I ask the witness just one question on this point for the sake of continuity in the record?

Trial Examiner Rogosin: Do you have any objection?

Mr. Hilton: I have no objection.

Trial Examiner Rogosin: It may be done.

Mr. Leonard: Did I understand from what you said, Mr. Gregory, that every employee who was qualified under the terms of the Award was registered?

A. All those who signed the applications and were qualified were registered, yes, sir.

Mr. Leonard: So no employee who submitted an application and who was qualified was not registered?

The Witness: As far as I can recall that is correct.

Mr. Leonard: Thank you.

(Testimony of F. C. Gregory.)

Trial Examiner Rogosin: You may proceed, Mr. Hilton. [485]

Q. (By Mr. Hilton): The men who were not fully qualified, as you have stated, but who were permitted to work by the Labor Relations Committee, what if any designation was given to those men?

A. Some of them were fully registered, but I would say the larger part of those who were in question were given permits, the union not agreeing that they should be fully registered because they were not at that time members of the union. [486]

* * *

Q. (By Mr. Hilton): After the applicants for registration had been registered was any roster prepared by the Labor Relations Committee?

A. Yes.

Q. In what form was that roster prepared?

A. The roster was prepared and was printed in, I believe, April or May of 1935, shortly after the hiring hall was opened.

Q. What, if anything, did you do with the roster after you had it printed?

A. Well, we distributed it, copies to all of the employers, so that they would know who the registered men were and make copies available to the union throughout all of its offices, and so forth.

Q. How about the dispatchers?

A. Well, the dispatchers naturally were included.

(Testimony of F. C. Gregory.)

Q. How were the individual registered men advised?

A. Well, the registered men were advised, the fully registered men were issued what were termed brasses which were small brass [487] checks upon which their number was printed.

The permit men were given a permit card upon which their registration number was stamped, and the "P," the prefix letter "P" before it showed they were permit men. There were other means of identification too, but those were the principal ones.

Q. I believe you stated that the hiring hall opened in about March of 1935; is that correct?

A. That is correct.

Q. And you have outlined the method of dispatching the men from the hiring hall. From where were those men taken? How were they selected?

A. You mean how were they selected for dispatch?

Q. Let me withdraw that. You stated that the hiring hall commenced operations in about March of 1935. What, if anything, did your registration list have to do with the hiring hall?

A. Well, we had registered the men. In fact, one of the first things we did when we opened the dispatching hall was to issue the brasses and plugs to the men who were registered, and the ones who did not have those credentials were not allowed to plug in because they were not given any plugs and they were excluded from the gangs.

Trial Examiner Rogosin: You say "one of the

(Testimony of F. C. Gregory.)

first things we did," and I assume you are still talking about this Joint Committee?

The Witness: The Joint Committee, yes, [488] sir.

Q. (By Mr. Hilton): How about an individual who was not on the registration list that you have stated was prepared and the roster, and so forth. Was he permitted to go in the hiring hall and secure a job?

Mr. Leonard: I object to the question as incompetent, irrelevant, immaterial. Also hypothetical.

Trial Examiner Rogosin: It seems to me the real objection to the question, the one real ground for the objection would be leading, and that hasn't been urged, so I will overrule it.

Mr. Hilton: I was thinking that myself.

Trial Examiner Rogosin: It seems to me, Mr. Hilton, now we are getting down to what may be crucial issues, that we ought to avoid leading insofar as possible.

Q. (By Mr. Hilton): I believe you stated that the registration list which was prepared and distributed was the list from which the dispatchers dispatched men to the jobs. Is that correct?

A. That is correct. Also that list made the man eligible to plug in on the plug board because he had a plug that was issued to him by the Joint Committee.

Trial Examiner Rogosin: May I interject for a moment to clear this up in my own mind? Was the

(Testimony of F. C. Gregory.)

plug something different from the brass you speak about?

The Witness: The brass was a small oval brass check they wore on their watch fob for identification. The plug was a [489] small piece of fiber like that (indicating) on which the man's number was stamped. That number on there is the registration number. It is a small cylinder of fiber about three-eighths of an inch in diameter, one side of which has been smoothed off to allow the stamping of the man's registration number.

Each man who is working out of the plug board or out of the hall has one of these plugs which he inserts in a hole that just fits in the dispatching hall. The plugs are inserted in rotation, one after the other, as the dispatcher pulls the first plug that is put in, fills the first job, and subsequently the second and third and fourth plugs to fill subsequent jobs.

Trial Examiner Rogosin: As I understand it, these plugs are plugged into specific boards covering either night or day work or specific vocational jobs?

The Witness: Night or day and classifications. They are night or day, and each night and day is divided into various classifications.

Trial Examiner Rogosin: Let the record show that the witness has produced from his pocket and exhibited to the Examiner in the presence of counsel an object such as he has rather graphically described, it seems to me, in the record.

(Testimony of F. C. Gregory.)

Is that a fair statement, gentlemen?

Mr. Leonard: Yes, sir. I have no objection to his putting it in evidence if you would like. [490]

Mr. Holmes: He didn't state the length.

Trial Examiner Rogosin: I think he did, didn't he?

The Witness: No, I didn't. It's about an inch and a quarter long, but it is just long enough to go through a 5/8-inch board which is called the plug board and have ample room on the inside for the dispatcher to pull it out without difficulty.

Trial Examiner Rogosin: As I understand it, the dispatcher who removes the plug has no way of telling whose plug that is until he has completely withdrawn the plug and examined the number which appears to be stamped on it?

The Witness: That is correct. The dispatcher then—if you want to complete the process of dispatching for the record—the dispatcher then calls out the number that is on this plug over a loud speaker system. If the man is in the dispatching hall he comes to the window, is handed back his plug together with his dispatching orders which are written out on a small sized tag.

Trial Examiner Rogosin: What happens if the man isn't within the hearing of the voice of the dispatcher?

The Witness: Well, he is given three calls at brief intervals, and if he does not respond to any of these calls he misses his plug, it is set aside, and he misses his opportunity to work that day.

(Testimony of F. C. Gregory.)

Trial Examiner Rogosin: Does that mean that he has to [491] wait then until they go through all the rest of the plugs and start all over again?

The Witness: Normally he would, yes, unless he would come up to the dispatcher and explain his absence in a satisfactory manner.

Trial Examiner Rogosin: Would the dispatcher then have authority to restore him to his place in order? Is that something that the dispatcher has discretion about?

The Witness: Well, the dispatcher uses his discretion on that, I would say, without any specific interference from the Committee. But there are not very many plugs missed, and if a man comes in who is known to be a steady worker and he says, "I was held up on the bridge by an automobile accident," or "I got a flat tire and I didn't get in until 15 minutes late," he is generally then given an opportunity to have a job right along with the rest of the men.

Trial Examiner Rogosin: Thank you. I am not sure that it has any specific bearing on the particular issues we are concerned with, but just to complete the picture for my own information——

Q. (By Mr. Hilton): I believe you stated that the registration list and the roster was used by the dispatcher in sending out these men on jobs. Is that correct?

A. Well, the roster wasn't particularly used by the dispatcher unless there was a necessity of looking up an individual to see [492] whether he was

(Testimony of F. C. Gregory.)

registered or not. The man having his plug put in the board, the fact that he had a plug and was in the board was taken as evidence that he was registered. There were very, very few cases over the years where men have secured plugs illegitimately, but they are not a material factor.

Q. Has the committee ever received any complaints about non-registered men having a plug?

A. Yes, and we have acted on them.

Q. Could you tell us approximately how many times that has happened?

A. Oh, probably half a dozen times in 14 years, and in each case the man who helped the man secure the plug was summarily dealt with as well as the man who owned the plug. So it is not a question as regards any complaint against the dispatching system.

Trial Examiner Rogosin: The number, I take it, on the plug, corresponds with the registration number which was originally assigned to the particular longshoreman?

The Witness: That is correct.

Q. (By Mr. Hilton): Would there be any instances where the dispatcher would have to go outside of the registration lists in order to secure longshoremen for any particular jobs?

A. Yes, sir.

Q. When would the dispatcher do that?

A. Well, the dispatcher will pull all of the plugs in the [493] given section at the dispatching hour. Now, the dispatching hours are from 6:30 to 8:30

(Testimony of F. C. Gregory.)

in the morning and from 4:00 to 6:00 in the afternoon. If orders come in in between there, a registered longshoreman is not required by the rules of the Labor Relations Committee to accept a job unless he desires. In that case it is necessary if they are going to fill an emergency job, to go outside of the registration list. Registered men are given the first opportunity to those jobs, but then there have been frequent times during the past 14 years when the entire registration list as shown by the men in the plug board has been exhausted and still there are calls for men, one or two men to fill out a gang or half a dozen men for carloading, or something like that where the dispatcher has no registered men to work with at all. In that case he has to go outside the registration list to fill those orders.

Q. What would be the usual procedure in filling such a request for an employee?

A. The dispatchers would generally first call on the warehousemen's union, Local 6, ILWU, then on the Scalers Union——

Mr. Holmes: Another local union?

The Witness: Yes, and other local unions before they would then tell the employer they could not secure any men for them.

Q. (By Mr. Hilton): What, if anything, can the employer do then if he hasn't secured that man? [494]

A. If the dispatcher tells the employer absolutely there are no men available, then the em-

(Testimony of F. C. Gregory.)

ployer has the right which he does not very often exercise, to go out and hire anybody he wants to. These men who are dispatched who are not registered men are given a white ticket, a one-day dispatch, and are not eligible to hold that job over the one day unless their employer is told by the union before the close of that shift that they had better keep this man on because there is going to be a shortage again tomorrow. That is sometimes done.

Q. What, if anything, happens to this man if there is a registered man available in that classification?

A. Well, in the first place he wouldn't be called or he wouldn't be employed if there was a registered man available.

Q. I mean, after this man has secured—this non-registered man has secured the job and given the one-day card.

A. He would work out that day regardless of whether a registered man showed up later or not, but he would be laid off at the end of the day.

Q. I believe you stated that the Labor Relations Committee gave permits to this certain group of employees when the registration list was first set up. Is that correct?

A. That is correct.

Q. How long did that system remain in effect?

A. That system remained in effect until July of 1947, when [495] the union finally took into its membership all the remaining permit men, and they were given full registration. There have not been any permits granted since that time because there

(Testimony of F. C. Gregory.)

have been no new registrations or practically no new registrations, and those have been to experienced men that the union was willing to take in.

During the war time we had periods of more permit men than we did registered men.

Q. That was just during the war, is that correct?

A. That is correct. Always from 1935, up until 1937, there have been some permit men on the registration list.

Q. During, say, about August of 1945, approximately how many men did you have registered?

A. In August, 1945, we had approximately 10,000 men on our rolls.

Mr. Leonard: Excuse me, there is a little ambiguity there. The question was how many men were registered; the answer was "on their rolls." Is that the same thing?

The Witness: No. There were 10,000 men who were either fully registered or permit men.

Trial Examiner Rogosin: But all longshoremen you are talking about?

The Witness: Longshoremen who were either fully registered or permit men.

Q. (By Mr. Hilton): Did there come a time when that number [496] was reduced?

A. Yes. Toward the end of September or in October of '45, the Labor Relations Committee reduced the registration by approximately 1,000 men, arbitrarily taking the last 1,000 men who were registered and telling them there was not any work for them.

(Testimony of F. C. Gregory.)

Q. That is the newest 1,000 men on the list who were dropped, is that correct?

A. That's right. The last 1,000 who had been registered. But those were all permit men.

Q. That left you with approximately 9,000?

A. That is correct.

Q. On the registration list, or who had permits, is that correct? A. Yes.

Q. Has that number been reduced since September or October, 1945?

A. Yes, it has been reduced to about 650 at the present time on the list.

Q. At present? A. At present about 650.

Trial Examiner Rogosin: I take it these are all now registered men?

The Witness: They are all now registered men.

Q. (By Mr. Hilton): Now, how about additions to the [497] registration list. Have any new men been added to the registration list?

A. Oh, there were additions to the registration list in each year since 1935, and taken in by the Committee generally on the permit basis. Then when they were initiated into the union they were given full registration. That is true up to even the present time, but during 1948, the only additions that have been made have been men who have left the industry, formerly registered men who had dropped out and have come back and been re-registered.

Q. Since August of 1945, when you dropped the

(Testimony of F. C. Gregory.)

1,000 newest men from either the registration list or the permit list have you added any names to the list?

A. Yes, we have added a few. We have deleted very many more, but we have added a few men who are sons of longshoremen who have come of age and wanted to follow in their fathers' profession. We have always given first preference to them. Men who have been formerly registered in the industry who dropped out and have come back have been re-registered. But the number that have been registered has been comparatively small while the number who have been dropped has been comparatively large.

Q. Directing your attention to General Counsel Exhibit No. 2, Section 4, Page 12, it provides that each longshoreman registered who is not a member of the ILWU shall pay to the Committee [498] a sum equal to the pro rata share of the whole by each member of the ILWU. Is that correct?

A. That is correct.

Q. What has been the practice of the Labor Relations Committee with respect to that provision?

A. That has never been observed by the Labor Relations Committee. We attempted, that is, the employers attempted in 1935 to get an understanding as to what the permit fees would be, and an accounting of them to the Labor Relations Committee. The union refused. So there has never been in this port any accounting of the moneys

(Testimony of F. C. Gregory.)

that have been taken in for permit fees. Those have gone to the union.

* * *

Q. (By Mr. Hilton): Now, again directing your attention to [499] Section 4, Page 12, of General Counsel's Exhibit No. 2, this section provides that the expense of the hiring hall shall be borne one-half by the ILWU and one-half by the employers. Is that correct? A. Yes.

Q. Could you tell us how that works out?

A. Well, immediately upon the starting of the dispatching hall in San Francisco the Longshore Labor Relations Committee of San Francisco set up a joint bank account in its own name contributed to 50-50 by the employers and the union, and at the present time that account has a total of \$10,000 in it, \$5,000 of which is contributed by the union and \$5,000 by the employers; the parties being billed once a month for one-half of the actual expenses of the committee during the preceding month.

Q. How many dispatchers do you have at the San Francisco hiring hall?

A. We have six in San Francisco. One of them is termed the Chief Dispatcher, one of them is the Assistant Chief, and the other four just dispatchers.

Q. Are their salaries paid by the Labor Relations Committee? A. Yes, sir.

Q. And in turn, of course, that is divided among the employers and the union, is that correct?

A. That is correct. [500]

(Testimony of F. C. Gregory.)

Mr. Hilton: Mr. Examiner, I have about finished with that line of questioning on Section 4. You did mention that you might want to interrupt with some questions.

Trial Examiner Rogosin: I assume you intend to deal with the question of registration of longshoremen who are not members of the union, and the payment of the pro rata share, as described in the last sentence of that paragraph. I am not going to interject unless you don't intend to cover that.

Q. (By Mr. Hilton): Directing your attention to the last sentence which provides for non-registered longshoremen paying to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall, can you explain that provision, please?

A. Well, that was in the original arbitration award but, as I stated previously, in San Francisco it has never been effective; the union, with respect to their permit men refusing to turn over their permit fees to the Joint Committee, so that has been a dead letter as far as San Francisco is concerned.

At the present time there is only one non-union registered longshoreman, and he is a lone wolf, you might say.

Trial Examiner Rogosin: When was he hired?

The Witness: He was in the 1934 registration but he was, you might say, expelled from the union in January of 1947, but he retained his registration.

(Testimony of F. C. Gregory.)

Q. (By Mr. Hilton): I believe you stated he is the only [501] non-member of the union who is registered?

A. The only one to my knowledge who is still working as a longshoreman who has not been removed from the roster.

Q. What date did you state all registered longshoremen were taken into the union?

A. During the month of August, 1947.

Q. Well, prior to the time when you had men registered who were not members of the union, how did the Labor Relations Committee collect the pro rata share of that individual?

A. It has never collected it.

Trial Examiner Rogosin: Since the original agreement?

The Witness: That is correct.

Q. (By Mr. Hilton): Is there any reason or explanation for it?

A. Well, the only explanation that I know is that in 1935, after the hall was started, and the union was collecting permit dues, they were requested in the Joint Committee to make an accounting of those dues and to turn them over to the committee because the union was the one that was collecting the dues on the permits and reissuing the permits after the men were first given a permit by the Committee, and they merely refused to do it.

Mr. Hilton: I have finished with that line of questioning, Mr. Examiner. Do you desire to ask any questions yourself on it?

(Testimony of F. C. Gregory.)

Trial Examiner Rogosin: You may proceed. Thank you. [502]

Q. (By Mr. Hilton): You have been handed what has been marked for identification as General Counsel's Exhibit No. 44, and I will ask you if you can explain that?

A. This was the agreement that was entered into first on December 20, 1940, and was continued on until 1945-46. It is a copy, a printed copy of that agreement. It was printed by the Labor Relations Committee so that all longshoremen, as well as all employers, would have available for them an authentic copy.

Q. The Longshore Labor Relations Committee, whose name appears on the cover, is that the committee of which you are a member?

A. Yes. That is the Joint Committee. That is the name that it adopted in 1934, and has gone under ever since.

Q. Directing your attention to what appears on the caption as "Working and Dispatching Rules," can you identify the working and dispatching rules as contained in the exhibit?

A. Yes. The working rules are printed, starting on Page 21 and going to the middle of Page 25.

The dispatching rules start on Page 25 and go to Page 29.

Q. Now, who adopted and established the working and dispatching rules?

A. They were both worked out in the Joint Labor Relations Committee during November, De-

(Testimony of F. C. Gregory.)

cember, January, 1934, and 1935. When the Committee reached agreement upon them they [503] were submitted then to both Associations for approval and were so approved.

Q. Are these working rules and dispatching rules in effect now?

A. With a very few exceptions.

* * *

Q. Directing your attention to the dispatching rules, which commence at Page 25, can you tell us what, if any change, has been made in the dispatching rules? [504]

A. Paragraph 7, Extra Gangs, has been changed in that the gang now consists of one gang boss, two deck men, six hold men and two dock men. Four dock men and one jitney driver have been removed from the gang and are employed directly by the walking boss of the company.

Q. In the same section, 7 (a), so that the number of the standard gang of 16 is reduced to 11, is that correct?

A. That is correct.

Q. Do you recall when that change was made?

A. It was made in June of 1947.

Q. Are there any other changes?

A. Not that I recall.

Q. Directing your attention to Section 5, Preferred Gangs, have there been any changes there?

Trial Examiner Rogosin: 5 or 6?

The Witness: 6.

Mr. Hilton: 6, on Page 26.

A. There has been no change in the rules, but

(Testimony of F. C. Gregory.)

There are no more regular or preferred gangs. The preferred gang was the name that was given to a gang that was regularly employed by one company.

Q. What happens to all gangs now?

A. They are, all of them, extra gangs or hall gangs. All of them are rotated through the hall.

Q. How long has that been the practice? [505]

A. Since 1938.

Q. Directing your attention to Section 8 of the dispatching rules, on Page 28, have there been any changes at all with respect to Section 8 (b)?

A. 8 (b)——

Q. I will withdraw the question.

A. Well, that was never actually observed down here because it was impractical to pull a man's plug and put it at the bottom of the list. But in effect it was put into effect by the Labor Relations Committee and the union limiting the amount of work in any one week when there was a shortage of work, for setting port hours, and any man who went beyond that was subject to penalty.

Q. That was under the equalization of work clause in the agreement, is that correct?

A. Yes. That was found to be much more practicable than to put it up to the dispatcher to remove a man's plug and put it at the bottom of the list.

Q. Directing your attention to Page 29 of the exhibit for identification, which is captioned "Rules for Registered Longshoremen," are they still in effect?

(Testimony of F. C. Gregory.)

A. They have never been changed. I think that, outside of No. 2, we no longer, since the war time, are using brass checks, but are using identification cards. They are practically all in effect at the present time. If a man loses his [506] identification card he is charged the dollar by the committee instead of 50 cents.

Q. How about the General Dispatching Rules on Page 28, have there been any changes?

A. Those were adopted by the union membership and merely printed in here for the convenience of the members. Whether or not they have been changed I could not tell you.

Q. And the General Rules on Page 29, as adopted by the ILWU membership, they are as stated?

A. Pardon me. I was referring to those in my last answer.

Q. My question was directed to the General Dispatching Rules on Page 28.

A. No, they have never been changed.

Mr. Leonard: To clear the record at this point, those general dispatching rules on Page 28 were jointly adopted?

The Witness: That is correct. The ones on Page 28 were rules of the Joint Committee. The ones at the bottom of Page 29 were union adopted rules which were printed for the convenience of the members.

Mr. Hilton: I would like to offer this in evidence as General Counsel's Exhibit No. 44.

(Testimony of F. C. Gregory.)

Mr. Leonard: The whole document, Mr. Hilton, or just the part beginning on Page 21?

Mr. Hilton: Just what I have covered in here, the working rules. [507]

* * *

Trial Examiner Rogosin: The exhibit is received with that qualification.

(The document heretofore marked General Counsel's Exhibit No. 44 for identification was received in evidence.) [508]

GENERAL COUNSEL'S EXHIBIT No. 44

Dispatching Rules

San Francisco Longshore Dispatching Hall

Dispatching and Dispatching Hours

1. Men shall be ordered so they will be able to be dispatched during regular dispatching hours.

2. Dispatching Hours:

6:30 a.m. to 8:30 a.m.

11:00 a.m. to 12:30 p.m.

4:00 p.m. to 6:00 p.m.

Hall open from:

6:00 a.m. until 6:00 p.m. Week Days.

7:00 a.m. until 9:00 a.m. Sundays and
Holidays.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

3. All gangs going to work before 8:00 a.m., or ordered to travel before 7:15 a.m., must receive their orders before 3:00 p.m. the preceding day, including Sundays and Holidays.
4. Orders for gangs to turn to at 8:00 a.m. must be in with the dispatcher by 7:00 a.m. When a ship is in port, or its arrival is assured by 8:00 a.m., orders for gangs to turn to at 8:00 a.m. should be received at the Dispatching Hall the preceding evening.
5. Gangs or men to go to work between 8:30 a.m. and noon, must be ordered between 7:00 a.m. and 8:30 a.m.
6. Orders for gangs or men to turn to between 1:00 p.m. and 5:00 p.m. must be in with the dispatcher between 11:00 a.m. and 12:30 p.m.
7. Orders for gangs to turn to at 6:00 p.m., or later, must be in by 3:00 p.m.
8. Gangs and men must be ordered for a specific time and job.

Organization of Gangs and Extra Men's Lists

1. The registered men of the port will be divided into gangs and extra men.
2. Gangs will be divided into preferred gangs which will be assigned to companies, and extra gangs which will be available for dispatching to any company as needed.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

3. Extra men will be listed according to their special qualifications, such as winch drivers, jitney drivers, etc., to assist in dispatching.
4. Extra gangs and extra men will be dispatched in rotation.
5. The work will be divided as evenly as practicable among all registered men.
6. Preferred Gangs:

(a) Each employer will furnish the committee with the number of gangs and the names of gang bosses which he wishes to have permanently assigned to him. This number will be limited to his ability to provide the average work over the four weeks' period. If such gangs prefer to work for the employer instead of working as extra gangs, they will be so assigned and will be available for extra work only after all extra gangs are working or have received more than the average work of the port at that date.

(b) Such preferred gangs may consist of any number of men which is most desirable for the regular operations, but all members of such gang must be employed while the gang is working. Members of a gang may be assigned to do other work, providing that two or more gangs shall not be split to form an extra gang.

(c) The employer will select his preferred

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

gangs and furnish the committee with the names and permanent numbers of such members. The names of such gang members will not be listed on the extra board.

(d) When an employer no longer wishes to employ a preferred gang, he shall notify the gang boss and the dispatcher and at the end of the job the gang will be returned to the extra gang list.

(e) When a preferred gang wishes to return to the extra gang list, it shall inform the employer and the dispatcher and at the end of the job the gang will be returned to the extra gang list.

(f) If a member of a preferred gang wishes to leave that gang, he will notify his gang boss and the Dispatcher and will be relieved as the job is completed and a replacement can be secured from the list of extra men.

(g) Any temporary replacements in a preferred gang, or any temporary additions thereto, shall be assigned by the Dispatcher from the extra men's list, and upon completion of the job shall be returned to the extra list. If such vacancy is to be of a considerable length of time, due to injury, illness or other causes, the employer may request the Dispatcher to assign an extra man to this vacancy pending the return of the regular member.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

7. Extra Gangs:

(a) Extra gangs will be formed under the direction of the committee and will consist of a standard number of 16 men:

1 Gang Boss

2 Deck Men

6 Hold Men

6 Dock Men

1 Jitney Driver

(b) Extra gangs will be listed upon the rotation board by their number, and shall be dispatched in rotation, excepting that if an extra gang shall have worked substantially more than the average of the extra gang list, the dispatcher may place it at the bottom of the list until such time as work is equalized.

(c) If an employer desires larger than a standard gang, he will so inform the dispatcher and the additional men shall be taken from the list of extra men.

(d) If an employer desires less than a standard extra gang he will order the desired number of men and the Dispatcher will dispatch such men from the extra men's list.

(e) If an extra gang shall refuse a job when called in rotation, it shall be placed at the bottom of the list, unless the gang gives the Dispatcher a valid reason for such refusal.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

8. Extra Men:

(a) The extra men shall be placed on lists according to their special qualifications if they so desire:

1. Winchdrivers and Hatchtenders.
2. Jitney Drivers.
3. Hold and Dock Men.
4. Lumbermen.
5. Car Men.

(b) The men on these lists will be dispatched in rotation, excepting that if individuals have received more than the average amount of work of the extra men's list, they may be placed at the bottom of the list until such time as work has been equalized.

(c) If an individual called in turn refuses to accept a job, he shall automatically go to the bottom of the list, unless the man gives the Dispatcher a valid reason for such refusal.

9. In attempting to equalize the work of the port individuals or gangs that refuse work when called will not be entitled to have their hours equalized during that period at the expense of the gangs or individuals who have accepted such jobs.
10. Any employer may retain a "specialty gang" if sufficient "specialty" work can be supplied to enable such gang to work the average hours of the port.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

General Dispatching Rules

1. No gang shall be preferred by more than one company.
2. Upon completion of a job or ship, all gang bosses shall turn in their gang reports to the Dispatcher (printed report cards).
3. Upon the completion of a job or ship, all gangs and/or men shall receive their orders for the next job from the Joint Dispatching Hall.
4. All gangs may call the Hall for orders by telephone if it is practicable to do so.
5. All replacements called to fill temporary vacancies in all gangs must finish the job or ship for which they are called, unless otherwise provided for.
6. When an extra gang is hired it shall not be replaced by any other gang, until the gang has had at least least six hours' work.

Rules for Registered Longshoremen

1. Registered longshoremen are required to report at the Dispatching Hall upon notice from the Labor Relations Committee.
2. First Brass Check (permanent registered number) will be issued free. If lost, a charge of 50c for a duplicate check will be made.

(Testimony of F. C. Gregory.)

General Counsel's Exhibit No. 44—(Continued)

3. Carry Brass Check at all times.
4. Report loss of Brass Check to the Dispatcher at once.
5. No interchange of Brass Checks allowed. Any infringement of this rule may mean temporary suspension from the registered list.
6. Men who do not report for work for a period of thirty days will have their names removed temporarily from the dispatching list. Men desiring a leave of absence must leave their Brass Checks with the Dispatcher. Men on sick or injured list must report to Dispatcher before they will be replaced on the dispatching list.

Approved by the
Longshore Labor Relations Committee
February 18, 1935.

Admitted September 15, 1948.

Q. (By Mr. Hilton): Now, Mr. Gregory, are all of the registered longshoremen in regular gangs or in any other type of gangs?

A. About 50 per cent, roughly, of the men, are organized into regular gangs. About 50 per cent of them secure their work through the plug board.

Q. What do you mean by regular gang?

A. A regular gang is a gang that has been au-

(Testimony of F. C. Gregory.)

thorized and built up under the direction of the Labor Relations Committee, and it consists of a gang boss, two winch drivers, six hold men, two dock men as described in the dispatching rules there. That gang having been authorized to be built up under the direction of the committee works as a unit, and it reports to the dispatcher as a unit instead of as a group of individuals.

Q. Is there anyone in charge of this gang?

A. Yes, the gang boss.

Q. Approximately how many regular gangs do you have in the Port of San Francisco?

A. There were 258 during the months of July and August.

Q. Of 1948? A. Of 1948, currently, yes.

Q. Now, how about the men who are not in regular gangs? What do you call them?

A. They are the plug board men.

Q. How are the plug men hired?

A. They are hired as I described previously through inserting [509] the plug on which their registration number is stamped into the particular section of the plug board, either day or night, where they desire to get the job. Then when there is an order that comes in for extra men in that category the dispatcher pulls out the plug and dispatches the man to that job.

Q. I believe you have already stated that the hiring is on the rotary system. Is that correct?

A. That is correct.

Q. When an employer needs a gang or needs

(Testimony of F. C. Gregory.)

some plug men how does he go about getting them?

A. If he wishes a gang he telephones to my office because frequently there is a gang shortage and it is necessary to distribute the gangs among the orders that are placed in what we consider an equitable manner. When the orders are all in by 10:30 in the morning, my office goes through and balances the number of orders as against the number of available idle gangs, and then as we call it, we allocate them, fill the orders in accordance with the arrival of the ships or the particular importance of the passenger ship or a refrigerated cargo ship, something like that. Then the orders are telephoned by my man to the Chief Dispatcher who assigns the gangs.

The gangs are assigned by the Chief Dispatcher or the Assistant Chief Dispatcher. The two men work very closely together, and if there is an actual gang shortage we let the union know so that they can, if they can, rake up another gang [510] or build up another gang, why they will do so.

The gangs are then given their orders. Now, a gang may be ordered just as 11 men. It is not very frequent, but if they have a job that is discharging a ship to the dock they may order just 11 men, a gang, and order their dock men separately. Or they may order that gang as a 13-man gang or 16-man gang or any other larger than the 11-man minimum unit.

If the gang is larger than the minimum unit of 11 men then it is necessary for the dispatcher to

(Testimony of F. C. Gregory.)

assign to that gang from the plug board sufficient men to fill up, and if the gang is short-handed through illness or desire of a man to be off for a particular day, he has to fill out those shortages too.

So that the routine is this: We give the union, the employers give to the union Chief Dispatcher the number of gangs that are needed, the ships to which they are to be dispatched, and the size gang units that are to be dispatched to each of these jobs. Then the gang boss who is under orders from the dispatcher to call in for his orders at a certain hour, calls in, and he says, "You go to, for example, Pier 30, to the Hawaiian Planter. You want six or eight hold men and two deck men and two dock men. The company is taking care of the rest of it through their regular dock men that are employed in another manner," that is, employed separately.

The gang boss will then say, "Well, you have to send me [511] two hold men because I only have six in my regular complement, and you will have to send me one dock man because one of my dock men is off sick."

That is accomplished over the telephone and the orders for that particular job, that particular gang are written up in the dispatching hall for first one big sheet, and then a number of individual dispatch orders for each of the men that is needed for that job. Those are placed at the dispatching window, and when the dispatcher for that particular gang comes up the dispatcher takes those sheets, he pulls two hold men's plugs, one dock man's plug out,

(Testimony of F. C. Gregory.)

calls the numbers, the men come up and are dispatched and their plugs returned to them. The men then have received their orders for the job which include the dock, the ship, the company and the hour of reporting, and the gang to whom they are to report.

Q. I believe you stated previously in your testimony that the only time the dispatcher assigns a non-registered man to a job is where there are no registered men available. Is that correct?

A. That is correct.

Q. Are non-registered men permitted in the hiring hall?

A. Yes, if they behave themselves.

Q. Do you maintain any list other than the registration list that you described?

A. No, we do not. [512]

Q. When you say they permit non-registered men to be in the hall, do you mean they can bid on jobs?

A. No. The only time that a non-registered man would be in the hall looking for a job would be toward the end of a dispatching period if he was anxious to get a job. He would be there ready to take a job as soon as the dispatcher ascertained there were no registered men available. Then he would call out for anybody to take that job. If a man had been waiting in the background for that opportunity he would go up to the window, identify himself with his social security card, and in all probability would get the job.

Q. Are there any particular classifications in

(Testimony of F. C. Gregory.)

which a non-registered man may apply in the event a registered man is not available?

A. Well, I don't know whether I quite catch the import of your question, but——

Q. Let me withdraw that.

In what job classifications among longshoremen are vacancies that the dispatcher is not likely to be able to fill?

A. Well, the banana boats have always——

Q. First, can you give us the classification?

A. Well, there wouldn't be any particular classification, probably dock men that would be working on unpleasant cargo, because a gang, if a gang is assigned to a job it has to take it. The men dispatched out of the plug board to that job, as [513] long as there are men in the plug board, they are supposed to take it, although they can and do sometimes turn it down. But generally they take it regardless of whether it is a desirable job or not.

There is one notable exception which is the banana boats where there is hard labor of carrying bunches of bananas on the dock from the belt into the rail cars and carrying them from the belt on the dock to transfer it onto this other belt there that are not considered very desirable, and frequently registered men will not accept them even though they are available in the hall for dispatching. They have been allowed by the dispatchers to turn them down.

The banana jobs are frequently done almost ex-

(Testimony of F. C. Gregory.)

clusively by outsiders with the exception of the gang which discharges the ship.

Trial Examiner Rogosin: By "outsiders" you mean non-registered men?

The Witness: Non-registered men, yes, sir.

Q. (By Mr. Hilton): Can you give us any other instances where non-registered men are likely to have an opportunity to work on any particular type of ship?

A. Well, I would say that if work were at all brisk, there would not be any volunteers to work cement or bones or a few other categories of cargo that are considered unpleasant.

Now, the longshoremen, the registered men, you will [514] understand, are not required to answer to a dispatch call except at the dispatching hours between 6:30 and 8:30 in the morning. If a job comes in between then and night, if a registered man takes it it is purely on a volunteer basis. Many of those jobs are taken by non-registered men because the man doesn't want to take a short job, a one day job or something like that. And if the job is not particularly to his liking he will turn it down, and he can do it without in any way conflicting with the rules of the Labor Relations Committee.

Q. Would you say the practices that you have related are pretty common practices, or are they unusual? That is, with respect to the unloading of banana ships and the other undesirable cargo?

A. Well, normally there is one banana ship a week in. It is a day and a half to two days' job, and

(Testimony of F. C. Gregory.)

as I say, when the banana ships are coming in that is a regular occurrence.

The other is a regular occurrence, but it would depend upon the number of jobs that came in, the number of men that were wanted after dispatching hours were closed.

Q. On the banana ships approximately how many men are used to unload them?

A. About 200.

Q. Would you say that the majority, or could you tell us what percentage of the 200 would normally be non-registered men unloading the banana ship? [515]

Mr. Leonard: Before that question is answered may I interpose an objection on the ground this is not the best evidence. I think if Mr. Gregory were asked he would tell us that records are kept with respect to the number of men that work, what kind of cargo, what kind of ships and how many of them are registered men and how many are not, and if this is material—I doubt it very much—but if it is, I submit those records would be the best evidence and the testimony ought to be from the records and not from the witness' in effect guesses with respect to how many men are there and how many normally are registered and how many normally are not registered.

Trial Examiner Rogosin: Mr. Gregory, can you answer that from your own knowledge and recollection?

(Testimony of F. C. Gregory.)

The Witness: Well, I would have to say that the number of——

Trial Examiner Rogosin: An approximate figure?

The Witness: Yes, I could give you some figures but they would be variable figures because it depends upon how busy the port is and how much the men desire to work.

As to Mr. Leonard's statement, I do not believe there is any record either in the union office or our own office as to the number of men, casuals who have worked bananas, or the number of outsiders who have worked bananas or non-registered men, and the number of registered men. I do know from having had complaints from the company that does that work that at times more than 50% of the men are non-registered men. But [516] that would vary from ship to ship and from season to season in accordance with the business of the port.

Mr. Leonard: If there aren't any records and if the witness' testimony is based upon hearsay complaints I move then that it be stricken as of no evidentiary value.

The Witness: It is not based on hearsay.

Mr. Leonard: I am not arguing with the witness, I am directing the motion to the Trial Examiner based on the record to this point.

Trial Examiner Rogosin: I would like to hear further from the witness, first as to what he was about to say.

Mr. Hilton: I was going to clear that up, too.

(Testimony of F. C. Gregory.)

Trial Examiner Rogosin: I will reserve ruling on your motion until I get the rest of his answer.

Q. (By Mr. Hilton): As a member of the Labor Relations Committee, did you receive this information from the companies?

A. Yes, I received the information from the companies, and I have from time to time had an actual check made upon the number of registered men and the number of non-registered men who worked the docks.

As I stated, from those actual studies, I have found that up to 50% have been non-registered men. But that number is about a maximum, and it varies down to considerably smaller percentage.

Mr. Leonard: I move that the answer be stricken on the [517] ground it appears that the basis for the witness' answer is either hearsay or some reported studies which he has had made, neither of which sources of information is presently available to us. And the fact that they are not available to us, that is, in direct evidence instead of hearsay testimony, and the checks nor studies, neither being available to us, precludes us from cross-examining the witness on this point. [518]

Trial Examiner Rogosin: Were these studies and analyses made under your general supervision and direction?

The Witness: Yes.

Trial Examiner Rogosin: As part of your regular duties?

The Witness: Yes.

(Testimony of F. C. Gregory.)

Trial Examiner Rogosin: Objection overruled. The Motion to Strike is denied. The answer may stand.

While we have had this interruption, I heard you say or use the word "casuals." Do you use that interchangeably with the word "non-registered"?

The Witness: Interchangeably with "non-registered," yes.

Trial Examiner Rogosin: Is that the word in more common usage in the industry?

The Witness: That is correct. The Dispatchers and the union members of the Committee and the employers speak of non-registered men as "casuals." That is probably a loose use of the [519] word.

* * *

Q. (By Mr. Hilton): I will hand you what has been marked for identification as General Counsel's Exhibit No. 46 and ask you if you can identify that?

A. This is the form that is used by the San Francisco Longshore Labor Relations Committee for the receipt of applications from a visiting Longshoreman, that is, a man who is a union member but who is registered in another port and desires to work temporarily in San Francisco.

Q. How long has that form been in use?

A. This is a comparatively recent form. I believe it was [521] adopted in 1946. Up to that time a small mimeographed form was used which was not as complete.

Testimony of F. C. Gregory.)

Q. The exhibit shows or has a line rather, for whether or not the applicant is a member of the ILWU local; is that correct?

A. That was intended for the applicant to put in the local which he belonged to and the time. For instance, if he were a member of Local 13, San Pedro, that would be what he would fill in there.

Q. Then in the following line, "Cleared by Labor Relations Committee," that is the Port Labor Relations Committee for that port?

A. That is correct. [522]

* * *

Q. (By Mr. Hilton): Now, Mr. Gregory, I believe you testified as a member of—strike that.

Mr. Gregory, as Manager of the Waterfront Employers Association of California, do your duties include the handling of any labor relations involving Clerks? A. Yes, sir. [528]

Q. By that I mean Ship Clerks?

A. Ship Clerks, yes. [529]

* * *

Q. (By Mr. Hilton): Now, has the Joint Labor Relations Committee ever removed any Dispatchers? A. Yes, one.

Q. How long ago or when was it?

A. Well, I am not absolutely sure of the date, but I believe it was in 1938 or 1939. One Dispatcher was insubordinate. He absolutely refused to go along by the instructions of the Committee. He

(Testimony of F. C. Gregory.)

was called before the Committee, he verbally refused, and he was removed from office. [542]

* * *

Direct Examination

(Resumed)

By Mr. Hilton:

Q. Mr. Gregory, I believe yesterday at the conclusion of the hearing that you stated that the Dispatcher was selected by the Labor Relations Committee, that is, for the Ship Clerks, from the membership of the Union. Is that correct?

A. That is correct.

Q. Now, can you tell us how the Dispatcher receives requests for Clerks and how he dispatches those Clerks pursuant to the requests?

A. An employer has a man in his organization, a designated man or men in the Dock Agents Department, who determine the number of Clerks that are needed, the number of daily Clerks out of the hall that are needed, and merely telephone that order, giving the number of men and the description of the work that is to be done. The Dispatcher selects the men from the list which I described, who have the qualifications for that job and who have the lowest number of hours for that month.

Q. How does the Dispatcher notify the hourly or daily Clerks to report to this employer?

A. Well, the men are in the hall and the Dispatcher merely [551] calls them up and gives them the dispatch order to that particular company. It

(Testimony of F. C. Gregory.)

is very simple. The only complication would be that if a man were not present in the hall at the time the dispatch was given out, then the Dispatcher would make a notation on the list that he was not present, and he would be considered as refusing or not being available for the job—not refusing it, but not being available, and it would pass on to the next man.

Q. Does the Dispatcher have any regular hours for dispatching Ship Clerks?

A. Yes, there are regular dispatching hours for the Ship Clerks as well as for Longshoremen. They are stated in the agreement.

Q. What are the hours for dispatching Clerks?

A. I believe they are the same as the Longshoremen. If I may have a copy of the Clerk's Agreement——

Q. I will show you General Counsel's Exhibit No. 3.

A. On page 25 of this exhibit, San Francisco Hall is open 7:00 a.m. to 5:30 p.m.; dispatching hours, 7:30 a.m. to 8:30 a.m., 11:00 until noon, 4:00 p.m. till 5:00 p.m.

East Bay Hall, Oakland, 7:30 a.m. to 5:00 p.m.; 8:00 a.m. to 9:00 a.m., 11:00 a.m. to 12 noon—dispatching hours are 8:00 a.m. to 9:00 a.m., 11:00 till noon, and 4:00 to 5:00 p.m.

The same rules apply to orders that come in between for replacements or for an emergency job. If a man is in the hall he is given that job on volunteer basis between the dispatching [552]

(Testimony of F. C. Gregory.)

hours, and men are not required or penalized in any way for failure to accept a dispatch on that basis.

Q. Now, you state that the Dispatcher takes the men from the registration list. Is that correct?

A. Well, from this list, the list that I referred to is a list of the registered men or the registered permit men who come into the hall and register at the completion of a job. There are two different lists. The registration list is maintained by the Labor Relations Committee. It contains the names of all of the Clerks who are on an hourly basis. It does not contain the monthly Clerks, but all the Clerks on an hourly basis whether they are working regularly for a company or whether they are working out of the dispatching hall. That is a regular list which is only changed from time to time as a man is removed from the list or as another man is added to the list.

But this list which is kept by the Dispatchers is merely a register book which he has on his counter, and as a Clerk finishes one job he comes back to the hall and registers as available for another job. Then the Dispatcher places after his name the number of hours he has worked that month. Then from the men who are on that registered list, as orders come in, the Dispatcher picks the low man who is capable for the job and gives him the order, if that man is available in the hall at the time. [553]

Q. But only men whose names appear on the registration list as maintained by the Labor Rela-

(Testimony of F. C. Gregory.)

tions Committee are put on the list which the Dispatcher has?

A. Yes. They are the only ones who are eligible to sign this list.

Q. Now, you mentioned permit men. Are permit men on the register that is maintained by the Dispatcher?

A. Yes. The permit men are on there in a separate category.

Q. Can you explain that a little more—"the permit men are on there in a separate category"?

A. Due to the preference of employment clause, the Labor Relations Committee has ruled that as long as a fully registered Clerk is available for a job, then the permit men do not get any calls. That is in general carried out because the men themselves police the dispatching of men so that no permit men would go out when a fully registered man was in the hall.

Q. Do you know whether or not any separate list is maintained by the Dispatcher for permit men?

A. Yes. They are registered in a different place. The Dispatcher first goes to the fully registered men, and when that list is exhausted, then he goes to the permit list.

Q. In the event that the Dispatcher is unable to furnish a man with the qualifications necessary for the particular employer from either the register or fully registered Clerks, or the permit list, what does he do? [554]

(Testimony of F. C. Gregory.)

A. He gets a man from outside sources. There are a number of men around the Bay who are anxious to become Ship Clerks. They are generally recommended by a union member. The Dispatcher has their telephone number and gets in touch with them, or some of them actually come to the hall awaiting, if there is a busy time, the exhaustion of the registration list in order to pick up the job. Whenever we have a busy time there are considerable numbers of those men sent out, but only until there are men from the regular registration list or the permit registration list, become available.

Q. How are they dispatched to the employer by the Dispatcher?

A. They are dispatched in the same manner, after all the other men are exhausted, as the regular Clerks are; merely given a dispatching slip to fill out a job that an order has been placed for.

Q. Well, the slip that is given to this Clerk, who is neither fully registered nor a permit man, how long is that good for?

A. Well, it is supposed to be good for only one day, but there are times when the Clerk, when he is sent out, is told to stay on the job until it is finished. For instance, during the month of August when we had more than normal work on the front and there was quite a shortage of Clerks, there were Clerks who were sent out and were told to finish the job. The Dispatcher uses his discretion on that. If he believes that on the next day there will be regularly registered men [555] avail-

(Testimony of F. C. Gregory.)

able, he will dispatch the man only for one day and will so inform the company.

Q. Well, when you refer to "he," do you mean the Dispatcher?

A. The Dispatcher. He uses his discretion in that.

Q. You stated that during August, which was an unusual month, that a number of these non-registered Clerks were permitted to work quite some time on the job. Is that correct?

A. Yes.

Q. That was August of what year?

A. August of 1948.

Q. Does the non-registered Clerk, is he required to report back to the Dispatcher at any time?

A. No. He merely works as long as he is permitted to work by the employer and is discharged, as his job is finished, or he is laid off because a registered man is available. Then he does not need to go back to the dispatching office at all. He merely waits for his pay check. But he probably, if he is one of those who is desiring to get on steadily, he will contact the Dispatcher and tell him that he is now again available for work if any is available.

Q. Let us say that a Clerk who has never been employed as a Ship Clerk, desires employment. How would he go about getting employment as a Ship Clerk?

A. Well, I think that he would approach a member—

(Testimony of F. C. Gregory.)

Q. You say you "think." We want your best recollection and [556] knowledge on this.

Mr. Leonard: If he has any knowledge.

Mr. Hilton: If he has any.

A. I do have knowledge of certain cases. I do not have knowledge of all the cases where they are sent out.

A man goes to a member of the Ship Clerks Union and has him recommend the man to the Dispatcher, and then the man makes himself available at the dispatching hall, or gives his telephone number to the Dispatcher, indicating that he is willing to accept this work.

Q. (By Mr. Hilton): He is not put on any registration list?

A. No. He has no permanent status at all as a Ship Clerk.

Q. When does your Labor Relations Committee add new men to the list, and can you explain how they add new men to the registration list?

A. The Labor Relations Committee, if there is agreement that additional men are needed, will take up in a regular meeting the proposal that, we will say, 10 men be added to the list on the East Bay. Then, if there is agreement that those 10 men shall be added, the union proposes that 10 men who have acted as temporary Clerks on this non-registered basis, be added to the permit list. They are taken in as permit men. The men are added to the regular register, fully registered list, only when the men have been admitted to the union, and then every

(Testimony of F. C. Gregory.)

time a man has been admitted to the union, the union members of [557] the Labor Relations Committee, at the next meeting, inform the full Committee that certain individuals have been initiated and a note is made in the minutes that these men are now considered fully registered Clerks.

* * *

Q. (By Mr. Hilton): I believe you stated that taking the 10 men who are to be added to the list, you mentioned that the men [558] had to be added to the list on mutual consent, is that correct?

A. That is correct.

Q. What do you mean by "mutual consent"?

A. Well, it means that the Labor Relations Committee, in discussing the need for men, will reach agreement, full agreement. There has never been any reference by the Ship Clerks to the Arbitrator. We are fully aware of the need for Clerks because each month the Committee compiles the hours of work for each man, and we also have knowledge of the number of outside Clerks who are employed. So when it becomes evident that there is great need for additional clerks, it is proposed by one side or the other, generally the employers, that a certain number of men be added to the list. If agreement is reached then, first on the number of men, then that is the first agreement. Then the union proposes certain of the permit men, that certain of these temporary men be added to the permit list.

That is the way men are inducted into the industry at the present. [559]

(Testimony of F. C. Gregory.)

Q. But the mutual consent is the agreement of the employer representatives and the union representatives; is that correct?

A. That is correct.

Q. I believe you stated that these ten new men would go on the permit list; is that correct?

A. That is correct.

Q. Would ten men then from the permit list go onto the fully registered list, or what would happen there, if anything?

A. Not necessarily. There is no connection between the two. The industry would be furnished with these additional ten men on a permit basis, either—but they would be on the permit basis. The addition of the men to the regular registered list would depend entirely upon whether or not the union inducted these men into the union and informed the Labor Relations Committee that they had been admitted to the union, at which time there has never been any question but they would be transferred over from the permit list to the regular registration list. [560]

* * *

Q. (By Mr. Hilton): During your time as a member of the Port Labor Relations Committee have you yourself ever recommended or suggested that a new man be added to the list, that is, a man of your own choosing? A. We did.

Q. I say, "you." I am speaking of you yourself, personally.

A. Yes. I have suggested from time to time

(Testimony of F. C. Gregory.)

names, generally of men who have been turned down by the Joint Committee. In one or two cases they have been taken on because there was no objection to them.

Q. How about other employer members of the Labor Relations Committee? Have they made suggestions or requests that men of their own choosing be placed on the list?

A. I do not recall any such case.

Q. As a general practice and normally who suggested the additions to the registration list?

A. The union members of the Committee.

Q. Mr. Gregory, are there any times when a fully registered man, that is, a ship's clerk, is not permitted to go on job [563] assignments?

A. There have been.

Mr. Leonard: I object to that question as incompetent, irrelevant, immaterial. I think it is pretty unintelligible.

Trial Examiner Rogosin: I don't quite follow it myself.

Mr. Hilton: I will withdraw it.

Q. (By Mr. Hilton): Mr. Gregory, are there any circumstances under which the dispatcher will refuse to permit a fully registered man, a daily clerk, to go out upon a job when a job is available?

A. Yes.

Mr. Leonard: Just a minute. It has been testified there are many such circumstances. If there are other people who have more hours than he has; if the man isn't qualified for the job.

The question is clearly ambiguous.

(Testimony of F. C. Gregory.)

Mr. Hilton: I think it is up to the witness to determine whether it is ambiguous or not.

Trial Examiner Rogosin: As a matter of fact, with the qualifications that have been indicated by Mr. Leonard——

Mr. Hilton: Yes, and he might have a broken leg, too, and he couldn't go out. I mean, we are acting sensibly in this.

Do you understand the question, Mr. Gregory?

The Witness: I understand it, I believe, sir.

There are occasions, fairly numerous, where men who would otherwise be up for dispatching due to their hours and the fact [564] that they were on the registration book and ready for work and so forth were not permitted to go out on a job.

* * *

The Witness: The occasion for the refusal to send men out occurs, number one, when the Labor Relations Committee in the exercise of its powers has suspended a man. Those are not frequent. [565]

* * *

The Witness: The second group is the case where the union itself in following out its own rules has suspended the man from work for from one day to as much as thirty days.

The third case which is fairly infrequent is where the union has decided to deny the man any opportunity to work. During 1948 there is one case where the man was refused work for a considerable period

(Testimony of F. C. Gregory.)

of time. He actually appealed to the Labor Relations Board to try to get reinstated.

Q. (By Mr. Hilton): What, if anything, did the Labor Relations Committee do with respect to that individual?

A. Well, the Labor Relations Committee was unable to agree upon any disposition of his case.

Q. What eventually happened to the man?

A. Well, the man isn't working.

Mr. Leonard: Nobody is.

The Witness: And was not working up to September 2nd.

Q. (By Mr. Hilton): When the strike was declared? A. Yes.

Q. Now, Mr. Gregory, are you familiar with the hiring practices prevailing in the other ports, that is Los Angeles and Portland?

A. I am in a general way. I haven't been in their hiring halls for—well, since along in 1943 or '44. But I know in general their hiring practices from direct observation. I do [566] not believe they have changed significantly since that time.

Mr. Leonard: I move the last sentence of the witness' answer be stricken as opinion and conclusion.

Trial Examiner Rogosin: Motion denied.

Q. By Mr. Hilton): I will show you what is in evidence as General Counsel Exhibit No. 4 which is the agreement between the Waterfront Employers Association of California and the Marine Clerks Association, Local 1-63 of the ILWU, cover-

(Testimony of F. C. Gregory.)

ing the ship clerks in the Los Angeles-Long Beach Harbor. Is that correct? A. That is correct.

Q. Are you familiar with that agreement?

A. Yes.

Q. Directing your attention to Page 4 of the exhibit, Paragraph 8 (b) (2), Paragraph 8 provides for the establishment of a Labor Relations Committee. Is that correct? A. Yes, sir.

Q. And sub-paragraph (b) (2) provides for the establishment and supervision by the Labor Relations Committee of the dispatching hall?

A. That's right.

Q. The expenses of which shall be borne equally by the union and the Employers Association?

A. Yes, sir. [567]

* * *

Q. Do you know whether or not there is any hiring hall established and maintained in Portland?

A. There is a physical hiring hall in [576] Portland.

* * *

Q. (By Mr. Hilton): One question. Approximately how many clerks are registered in San Francisco?

A. There are around 700 registered daily clerks, and there are about 220 monthly clerks.

Q. Approximately how many clerks are registered in the Los Angeles-Long Beach area? [579]

A. There are about 400. [580]

* * *

(Testimony of F. C. Gregory.)

Q. (By Mr. Hilton): All right now, tell us the discussion at the meeting of April 28.

A. Well, there was a discussion of the Employers' demands for modifications and a general rejection of those demands by the union. That was the sum total of the meeting.

Q. What demands were the Employers' Association making upon the union? What changes did they want?

A. Well, in the first place there was the preference of employment clause which we wished to delete. In the second place, there was the matter of certain supervisory employees whom we did not consider should be a part of the bargaining unit but should be excluded from it under the definition in the Labor Management Act. Those were it. [586]

Then there was the matter of the Dispatcher whom we desired to be neutral rather than appointed as at present as a member of the union.

Q. Was any discussion had on these subjects you just mentioned?

A. There was limited discussion, but principally it was just a statement by the union they could not accept them.

Q. What was the conclusion of the meeting?

A. Well, the meeting concluded on the basis that nothing was accomplished at that meeting, but that the whole matter would be subject to further negotiation after agreement had been reached on the Longshore items, two of which were similar to

(Testimony of F. C. Gregory.)

these: the matter of preference of employment, and the matter of the Dispatcher. [587]

* * *

Cross-Examination

By Mr. Leonard: [614]

* * *

Q. If I understood your testimony a minute or two ago, Mr. Gregory, between the period of the Arbitrator's Award in 1934 and the execution of the 1937 contract, which for the first time contained a preference of employment clause, in [677] that first period no consideration was given to membership or non-membership in the union?

A. There was no difference made as far as the employers were concerned. The union did object to men who were non-union and it was only after being pressed that the Award required the registration of these men originally, that the union consented to register them.

After the first registration was closed then they definitely objected to anyone that they did not consider a good union man coming in. [678]

* * *

Q. And from 1937 to the present time, because of the preference of employment clause which has been in the contracts, which is in the latest contract, Section 6 in General Counsel's Exhibit No. 3, why you have been informed by the union from time to time which longshoremen were its members?

(Testimony of F. C. Gregory.)

A. Yes. When a permit man was initiated we were informed and we changed our records, the Joint Committee records, to show that he was a fully registered longshoreman.

Q. And as such he was then entitled to preference of employment over permit members?

A. That is correct.

Q. And his entitlement, if I can use the word, to preference of employment flowed from the preference clause which is Section 6 of the contract?

A. That is right. [682]

* * *

Cross-Examination

(Resumed)

By Mr. Leonard: [722]

* * *

Mr. Holmes (Interposing): What meeting was this, first?

Trial Examiner Rogosin: The April 28th meeting. [763]

* * *

Q. (By Mr. Leonard): Well, do you have any recollection at all, Mr. Gregory, as to whether preference was discussed, or whether the discussion was limited to matters that you just mentioned?

A. No, I am quite sure that preference of employment was discussed briefly, but I have no recollection that there was any statement by the union that the International favored the removal of that from the contract, or anything like that. As I re-

(Testimony of F. C. Gregory.)

call the thing, it was more or less a minor issue at the time.

Q. With respect to the matter of the selection of the dispatcher, that was one of the major issues?

A. That was.

Q. And do you recollect what the position of the representatives of the union on that issue was?

A. It is my distinct recollection that they gave the same reply there that had been given earlier to the Longshore [767] Negotiating Committee, that it was the position of the union's attorneys that the present, or the provision that was presently in the contract at that time was legal and therefore did not need to be changed, and they were against any change. [768]

* * *

RUSSELL E. FERGUSON

a witness called by and on behalf of the General Counsel, National Labor Relations Board, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilton: [945]

* * *

Q. What is your occupation?

A. I am Manager of the Waterfront Employers of Oregon. [946]

* * *

(Testimony of Russell E. Ferguson.)

Recross-Examination
(Resumed)

By Mr. Leonard: [1028]

* * *

Q. Approximately how many clerks did you have on the registered list prior to the strike of September 2nd, 1948?

A. I think it was around 240, including all the categories.

* * *

Q. (By Mr. Hilton): Do you know whether or not the registered [1060] clerks are members of the union?

* * *

A. Yes, sir.

Q. (By Mr. Hilton): How do you know that?

A. The union has told us many times.

Q. Well, you say the union has told you?

A. The union officials and the union Labor Relations Committee members have told us many times here are no——

* * *

The Witness: There are no checkers or superargoes or supervisors working in the Oregon area that are not members of the union. [1061]

* * *

Q. (By Mr. Hilton): How about the casuals, do you know whether or not they are members of the union?

(Testimony of Russell E. Ferguson.)

A. No, the casuals are not members of the union.

Q. Now, how do you know that?

A. When the men are registered, a request made for registration by the union, they must be union members before they are presented to our Committee by the Union Labor Relations Committee. They have told us that. [1062]

* * *

Redirect Examination

By Mr. Holmes:

Q. Do you know whether the union imposed any other conditions at the time of registration in addition to the matter of competency? [1132]

* * *

The Witness: Yes. I know that union membership is required.

Mr. Holmes: That's all.

Recross-Examination

By Mr. Leonard:

Q. How do you know that?

A. I have been told so by officials of the union and the union members of the Labor Relations Committee.

Q. By which officials of the union?

A. Business agent, secretary.

Q. Name, please? A. Mr. Harry Rice.

Mr. Holmes: What is his position?

The Witness: I am not so sure that Harry Rice

(Testimony of Russell E. Ferguson.)

told me. Mr. Wally Hanks told me, the business agent before Rice.

Q. (By Mr. Leonard): When did Hanks tell you this?

A. A couple of years ago I do know.

Q. Some time in 1946? A. That's right.

Q. Anybody else ever tell you this?

A. Yes, a lot of them did.

Q. Name, please?

A. No, I don't think I'll give you any [1133] names.

Q. I didn't ask you whether you would or not; I asked you for the names of those who told you.

A. Well, I have talked to a lot of union checkers and they've all told me this.

Q. What have they told you?

A. That no man is going to be registered as a checker unless he belongs to the union.

Q. Now, these are checkers that you talked to, not union officials?

A. In addition to the union officials.

Q. Well, tell me the names of the union officials that you talked to with respect to this matter.

A. Mr. R. J. Wolf.

Q. When did you talk to Wolf?

A. Certainly within the last couple of years.

Q. Where? A. Where?

Q. Yes.

A. In my office in Portland. [1134]

ELLISON EBEY

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilton:

* * *

Q. What is your occupation?

A. Assistant Manager of the California Stevedore and Ballast Company.

Q. And where is the California Stevedore and Ballast Company located?

A. 311 California Street.

Q. Do you know whether or not the company is a member of the Waterfront Employers Association of the Pacific Coast? A. It is. [1272]

* * *

Q. (By Mr. Hilton): Now, do you know where the ships to be unloaded, where they come from?

A. I do.

Q. Where, please?

A. Well, we have lines running from here to the Orient, we have lines running from here to the South Pacific, we have lines running from here to Australia, we have intercoastal, and we [1275] have European.

Q. Now, since September the 2nd, 1948, have you loaded or unloaded any cargo on the ships?

(Testimony of Ellison Ebey.)

A. We have discharged a little mail and baggage off one Norwegian ship from the Orient.

Mr. Hilton: That is all.

Cross-Examination

By Mr. Leonard: [1276]

* * *

Q. Have you had any contracts to unload any other ships since September 2nd?

A. Well, we have all our contracts in force right today, but we have not placed any orders.

* * *

Q. (By Mr. Leonard): Why haven't you placed any orders since September 2nd?

A. There is a strike.

Q. And how did you know that there is a strike?

A. Well, I was informed of it by many different ways, by the men, by the Waterfront Employers, by my "tops," and by the newspapers.

Q. Well, now, by "the men," do you mean some of your employees?

A. Some of the working longshoremen.

Q. Yes. Now, did any of the regular longshoremen tell you not to place orders?

A. I would like to make one correction. We ordered the men we had working back—the daily gangs had finished on the 1st—we ordered them back to work, to come back to work on the 2nd. I understood that there was a stop-work meeting on the 2nd. We ordered them, if they didn't come back on the 2nd, to come back on the 3rd, the night

(Testimony of Ellison Ebey.)

gangs the same way. None of the men came back on any of those orders. [1278]

* * *

A. E. STOW

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilton:

* * *

Q. And what is your occupation, please?

A. Pacific Operating Manager for American-Hawaiian Steamship Company. [1332]

* * *

Q. (By Mr. Hilton): Is the American-Hawaiian Steamship Company a member of the Water-front Employers Association? A. Yes.

* * *

Cross-Examination

By Mr. Leonard:

Q. Has the American-Hawaiian Steamship Company operated any of its vessels on the Pacific Coast since September 2nd, 1948? A. Yes.

Q. Which ones?

A. None intercoastal. Some of the off-shore vessels are still coming in. If you want them by name I will have to phone down and get a schedule. [1336]

Q. No, that is quite all right. Then in answer

(Testimony of A. E. Stow.)

to my previous question, when you said the company was operating, or had operated vessels since September 2nd, 1948, you meant vessels which on that date were on the high seas, were still coming into port?

A. Yes. I consider them under operation.

Q. Yes. Have any vessels since that date, vessels operated by the company, been loaded and sent out on a new voyage since September 2nd, 1948?

A. No.

Q. Does that include the vessels which are under commitment to the Army and the Navy?

A. Yes, sir. [1337]

* * *

HENRY W. CLARK

a witness recalled by and on behalf of the General Counsel, National Labor Relations Board, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hilton:

* * *

Q. Mr. Clark, I believe you have testified that you are Vice President and General Manager of the Waterfront Employers Association of the Pacific Coast?

A. That is correct. [1756]

* * *

[Clerk's note: In a portion of the testimony of Henry W. Clark not designated for printing, the following exhibit was introduced in evidence.]

(Testimony of Henry W. Clark.)

GENERAL COUNSEL'S EXHIBIT No. 55

Employers Memorandum Given to Union
for Meeting, August 28, 1948, 2:30 P.M.

1. We have indicated the willingness of the employers to follow, in substance, the proposal made by you on March 24, 1948, to continue the present provisions of the contract concerning dispatching halls and preference of employment provisions, subject to the stipulation that, in the event of a legally binding decision of any court on this issue, the whole subject shall be subject to renegotiation at the request of either party.

2. The employers, as we have already advised you, are prepared to continue the status quo on coverage of contracts, except on the employers' proposal to exclude supercargoes.

3. As to vacations, we propose increasing the allowance so that it will consist of 5c per hour straight time and 7½ per hour overtime, crediting each longshoreman for each pay-roll hour of employment, to be accumulated in a vacation fund and paid to him when he takes his vacation, under rules established by the Labor Relations committee; or, if you prefer, the employers offer to renew the present vacation provisions.

4. As to limitations on hours of work, the employers offer to amend the existing agreement by adopting the provisions contained in the letter to

(Testimony of Henry W. Clark.)

you dated August 10, 1948, restricting work to nine hours, subject to the exceptions therein stated; and providing a limitation of 1,000 hours in any period of 26 consecutive work weeks under the terms set forth in our letter.

5. The employers propose to increase the basic wage rate of pay for longshore work, set forth in Section 3(a) of the agreement, to the extent of 12c per hour, with 12c added to each of the overtime rates specified in said Section 3.

6. The employers propose that each registered longshoreman shall be given a stated day off each week, to be scheduled by the local Labor Relations Committee, such date, however, not to be fixed on Sunday alone.

7. We propose that the present grievance machinery and arbitration provisions of the contract be continued, but the employers are willing to make an effort to agree with you in advance upon a mutually acceptable Coast arbitrator.

8. We propose to add to the agreement a provision that no person shall be dispatched through any of said halls to employers which are not members of an employer association party hereto, except on the written consent of the employers.

9. The employers propose reasonable restrictions on business agents.

With the foregoing amendments, we propose to renew the existing contract for a period ending

(Testimony of Henry W. Clark.)

June 15, 1950, but reserving to either party the right to re-open the subject of wage rates only be notice in writing, given at least 60 days prior to June 15, 1949; and with the provision that if the parties are unable to agree thereon, on or prior to June 15, 1949, either party may cancel; no other wage review provisions to be incorporated in the agreement.

Admitted September 29, 1948.

[Clerk's note: In a portion of the testimony of Henry W. Clark not designated for printing, the following exhibit was introduced in evidence.]

GENERAL COUNSEL'S EXHIBIT No. 60

Waterfront Employers Association
of the Pacific Coast
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

August 30, 1948

Mr. H. R. Bridges, President,
International Longshoremen's &
Warehousemen's Union,
150 Golden Gate Avenue,
San Francisco 2, California.

Dear Sir:

In a last effort to arrive at an agreement of contract with your Union and avert a strike, the

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)

Waterfront Employers present the following proposals:

1. On the subject of hiring halls, preference of employment, and union security provisions, we have offered:

a. To continue the contract as is; and if you wish, add a provision that in the event the hiring and preference clauses are suspended in any way as a result of legal action, this agreement shall terminate.

b. To adopt a proposal similar to the language appearing in your letter of March 24, 1948, as follows:

In the event of a legally binding decision by the courts holding there is a legal conflict between the contract and the law, the subject shall be subject to renegotiation at the request of either party.

c. To adopt a modified proposal as a result of our discussions to protect the position of your Union in the event clauses on these subjects are held unlawful or illegal. That proposal is attached and is in a large measure your own language of a substitute for preference of employment appearing in Section 6 of the agreement.

2. On the subject of arbitration, we propose continuance of the present machinery of the agreement, but with the following changes:

“The parties shall endeavor to agree upon

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)

an arbitrator to serve for the term of the agreement before it is executed but in the event they are unable to agree, procedure now provided in the contract for the selection of an arbitrator shall be followed.

“Section 10(f) shall be deleted from the agreement and, in lieu thereof, shall be substituted the following:

“All decisions of the arbitrator shall be limited to the express provisions of this agreement, and shall be final and binding upon the parties hereto, and shall be in writing, and a copy shall be submitted to each of the parties hereto.’ ”

3. On the subject of vacations we have proposed to increase the vacation allowances by accumulating 5c per hour straight time and 7½c per hour overtime, crediting each longshoreman for each payroll hour of employment, to be accumulated in a vacation fund and paid to him when he takes his vacation, under rules established by the Labor Relations Committee; or, if you prefer, the employers offer to renew the present vacation provisions.

4. On the subject of wages, we now make an offer of 10c per hour straight time, and 15c per hour overtime.

5. On the subject of hours, we have proposed the following:

“No employee shall be required to work in ex-

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)

cess of 9 hours in any one day, exclusive of travel time; provided, however, that this provision shall not apply in the event relief men or gangs are not available at the expiration of said 9 hours of work and provided further that an employee may be required to work more than 9 hours to finish the job or the ship.

“No longshoreman shall be employed and no longshoreman shall work more than 1000 hours during any period of 26 consecutive work weeks, the first of such periods to begin with the Monday following the execution of this agreement. Any time worked, whether as a longshoreman or as a car-loader, dockworker, or other category of employee, for any employer party to this agreement shall be considered time worked for the purposes of this paragraph. Paid travel time likewise shall be considered time worked for the purposes of this paragraph. If by amendment to Section 7 of the Fair Labor Standards Act or other legislation, or by Supreme Court decision, the obligations and rights of the parties to this agreement with respect to overtime under the Fair Labor Standards Act should be altered, then either party may on 60 days notice reopen the provisions of this paragraph and in the event that they cannot agree, the matter shall be submitted at the request of either party to the grievance procedure and arbitration under the terms of this agreement. This agreement is made subject to obtaining the certification re-

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)
quired by Section 7 (b)(1) of the Fair Labor Standards Act. No longshoreman shall work more than 40 hours in the work week for a single employer if relief is provided; but when relief is not provided, such longshoreman shall continue to work as required."

Each registered longshoreman shall be given a stated day off each week, to be scheduled by each local labor relations committee, such day off not to be Sunday necessarily.

6. On the term of the contract, we have acceded to your demand of June 15 termination date, and agreed to your proposal that the contract may run until June 15, 1950, with the understanding, however, that the wages established by contract will continue until June 15, 1949, with the right of either party to then open the subject of wages on notice given at least 60 days prior to June 15, 1949, and providing that if the parties are unable to agree on or before June 15, 1949, the agreement will terminate. (This would of course mean deletion of the wage review provision of the contract.)

7. Subsistence—

We have overlooked in our discussion the willingness of the employers to increase subsistence rates to \$2.25 per night for lodging and \$1.25 per meal.

The foregoing represents, in our opinion a most earnest effort of the employers to meet the demands which the Union has presented to them; it repre-

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)
sents, in several respects, substantial benefits in addition to those contained in the offer submitted to the Board of Inquiry and, in more instances than one, proposals made on behalf of the Union at one time or another.

All the employers are asking in turn is that you provide by contract reassurance that no person shall be dispatched through any of the hiring halls to employers who are not members of the employer association, except with its written consent, since it is the association which contributes to the support of the hiring halls, and reasonable restrictions on the activities of business agents.

In pursuance of discussions had today, the employers offer to continue the present provisions of the Coast Longshore Agreement relating to registration, hiring halls and preference with the following provisions:

1. No change in Sections 4, 5, 6, 8, and 10 relating to the hiring, dispatching and preference of employment to Union members, except that there will be inserted in the contracts:

1. In the event of a legally binding decision by court decision, which holds that any of the provisions of this agreement are not in conformity with the provisions of the Labor Management Relations Act of 1947 or, in the event of any court decision which prevents the parties from carrying out the

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)
provisions of this agreement, then either party may give 60 days written notice of its desire to amend this agreement and, in the event that the parties are unable to agree upon amendment or continuance of this contract within said period of 60 days, this agreement shall terminate.

2. Section 6 of the agreement shall be amended to read as follows:

(a) Preference of employment shall be given to registered longshoremen, now registered and working in the industry.

(b) Preference in registering new men in the industry shall be given to men formerly employed in the industry as registered longshoremen or registered permit men, where it is shown that such men were not dropped from the industry for good cause, or for reasons other than lack of employment.

(c) In the event that it becomes necessary for the parties to reduce the number of registered men, due to lack of employment, such reduction to be made on a seniority basis.

There shall be no change in the present provision of the contract for the equalization of work opportunities.

3. The employers are willing to delete the first two paragraphs of Section 11(e) of the agreement. but are unwilling to delete the power of the Labor

(Testimony of Henry W. Clark.)

General Counsel's Exhibit No. 60—(Continued)
Relations Committee to discipline individual long-shoremen.

Very truly yours,

F. P. FOISIE,
President.

Admitted September 27, 1948.

Q. (By Mr. Hilton): Now I will hand you what has been marked for identification as General Counsel's Exhibit No. 62 and ask you if you can identify that, Mr. Clark?

A. (Examining document): Yes, this was a letter from the ILWU to the Waterfront Employers dated August 31, and received by the Employers, I believe, that night or the next morning, it was after the negotiating meeting on the 31st, the Board meeting on the 31st. [1805]

* * *

Trial Examiner Rogosin: General Counsel's Exhibit 62 for identification may be received and so marked.

(The document heretofore marked General Counsel's Exhibit No. 62 for identification, was received in evidence.)

(Testimony of Henry W. Clark.)

GENERAL COUNSEL'S EXHIBIT No. 62

International Longshoremen's & Warehousemen's
Union

150 Golden Gate Avenue
San Francisco 2, California

August 31, 1948.

Waterfront Employers Association of the Pacific
Coast,

16 California Street,
San Francisco, California.

Gentlemen:

The Union offers the following proposals:

- (1) Hiring hall registration and preference.
 - a. Continue present provision as is.
 - b. The Waterfront Employers Association to send covering letter to the union stating that if hiring, dispatching and preference provisions are suspended in any way as a result of legal action or injunction proceedings, whether or not such proceedings are initiated by the employers, this agreement shall terminate and it is understood and agreed by the parties that any notices concerning termination of the agreement are waived.

- (2) Wages.

Increase basic straight time wage 13 cents per hour retroactive to June 15, 1948.

(Testimony of Henry W. Clark.)

(3) Wage review.

Contract to run to June, 1950, leaving wage review clause as is.

(4) Discipline and penalties.

Leave Section 11 (e) as is. Re-write Section 11 (b) as follows: Longshoremen shall perform work in accordance with the provisions of this agreement. No employer may order any employee to perform work in any way contrary to the provisions of this agreement or shall change conditions of work and order longshoremen to continue working under such changed conditions pending arbitration. No longshoreman shall be required to work when in good faith he believes that to do so is to endanger health and safety.

Re-write section 11 (i) as follows: Whenever a gang member is dispatched to a job and accepts the job dispatched to and fails to report to the job after such dispatch without sufficient notice to the Dispatcher to permit a replacement he shall be subject to discipline as provided in section 11 (e).

(5) Nine-hour shift.

We propose that the maximum stretch of work be limited to 9 hours, exclusive of travel time with a two-hour leeway to finish the ship when sailing and provided such 9-hour shift starts no earlier than 8:00 a.m.

(Testimony of Henry W. Clark.)

(6) Sunday off.

We propose that this union demand be set aside for the time being until our committee sees what progress can be made on other existing strike demands.

(7) Four-hour minimum.

We propose that the present contract provision for a minimum pay guarantee of 4 hours be extended to include all shifts which start on overtime hours.

(8) Subsistence.

We accept your proposals for the subsistence increase from \$5.00 to \$6.00 a day providing, however, that where higher rates for subsistence are now being paid, they shall not be reduced.

(9) Vacations, arbitration proceedings, arbitration awards, statutory overtime provisions.

We again propose that these questions be left for further study and negotiation in view of the time element with the understanding that there shall be no stoppage of work because of them and because the union believes that there is an area of agreement between the parties on these issues.

(10) The union still has several minor or fringe issues which it suggests either be left to further

(Testimony of Henry W. Clark.)

negotiation and arbitration or be gone over by the parties in the present negotiations.

Very truly yours,

/s/ HARRY BRIDGES,
HARRY BRIDGES,
President.

HB:hk

uopwa-34-cio

Admitted September 29, 1948.

Q. (By Mr. Hilton): Now, was there any discussion on the letter, General Counsel's Exhibit No. 62?

A. We stated to the union that it was unacceptable to us.

Q. Directing your attention to Paragraph 1(b), was there any discussion on that provision, which refers to the hiring hall provision?

A. Yes. We stated that we could not agree to any legal action [1806] or injunction proceedings because this did not cover the unfair labor proceedings that were already under way. It also covered immediate termination, which we did not feel would hold up under the law.

Q. Well, calling your attention to the provision "Refers to the Waterfront Employers Association sending a covering letter to the union——" [1807]

(Testimony of Henry W. Clark.)

A. There was considerable discussion, the union asking protection to itself as regards the hiring hall be put in a covering letter, and the employers maintaining the position that it should be in the contract itself. There was a lot of talk back and forth on this. The employers said that they had had previous experiences with covering letters where they were not able to enforce them in the same degree as a contract and for that reason they wanted it in the contract.

Bridges maintained the position that he wanted it in a covering letter, and the employers said "Would this covering letter be approved by the men?"

Bridges said it would be. [1809]

* * *

Q. Now, was any work performed along the Waterfront on September 2, 1948?

A. None, except removal of baggage and mail from ships that were coming in and discharging, as far as I know.

Q. Were there any pickets along the Waterfront?

A. Pickets appeared on the Waterfront after 10:30 on September 2, but I don't just know what time. I think it was about noon on the 2nd.

Q. Have you seen the pickets along the Waterfront yourself?

A. Yes. [1828]

* * *

(Testimony of Henry W. Clark.)

Q. (By Mr. Hilton): Mr. Clark, have any longshoremen been working along the waterfront since September 2, 1948?

A. As I stated before, longshoremen have been working discharging mail and baggage on passenger ships, and there have been some longshoremen working on Civil Service here for the Army and through two other stevedoring companies.

Q. Are these other stevedoring companies members of the Waterfront Employers Association?

A. They are not.

Q. Are any longshoremen working for any members of the Waterfront Employers Association on the loading or unloading of cargo [1837] other than mail and baggage?

A. No, sir.

Q. Have any ships been sailing since the 2nd of December, 1948?

A. No.

Q. September 2nd, 1948?

A. September.

Q. Well, I believe it is a fact that one ship did leave here, isn't that correct?

A. Oh, I think there was one, yes. I was not in the city when that left. [1838]

* * *

LINCOLN FAIRLEY

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leonard:

* * *

Q. And what is your employment?

A. I am the Research Director for the International Longshoremen's and Warehousemen's [2059] Union.

* * *

Q. (By Mr. Leonard): I show you what has been marked Respondents' Exhibit No. 17 for identification and ask you to examine that, please, and state what it is if you can.

A. This is a copy of the Award of the International Longshoremen's Board dated October 12, 1934. That was the award which concluded the 1934 strike so far as the longshoremen are concerned, and set the pattern for the contract between the parties.

Q. You say that the Award concluded the strike. The strike itself in 1934 concluded at some date earlier than October, didn't it?

A. Yes, it concluded in July. They went back pending this Award.

Q. There was a Board appointed by the President, is that right, at the termination of the strike in July of 1934?

A. Well, the Board had been appointed prior

(Testimony of Lincoln Fairley.)

to the termination of the strike, and acted as a mediating body, and an agreement was reached the 7th of August between the parties on the basis of which the full hearings were held and this Award was subsequently issued in October.

Q. There were hearings by this Board appointed by the President and on the basis of the evidence which the Board took at those hearings, it then issued this Award?

A. The hearings were in all the major ports, very voluminous transcript.

Q. And the Award was handed down in October, as you say, that [2060] was the original basic Award. From then on the contract, as a matter of fact, indicates there are some amendments to that Award?

A. That's right. The preamble to the present or the former contract specifies the award of October 12, 1934, and refers to subsequent amendments by arbitrators. [2061]

* * *

Trial Examiner Rogosin: As I read the Complaint, Mr. Holmes, and I direct the question to you because I think you are in a better position to answer it, there is an allegation of a continuing refusal to bargain, I assume, up to the present time. What would you say with respect to the position of the employers that they will not bargain with the union unless and until the union complies with the provisions of Sections 9(f) (g) and

(h) of the Amended Act, a position which was asserted for the first time, as I recall, in the bargaining negotiations on September 1st or thereabouts. [2299]

* * *

Trial Examiner Rogosin: Do I understand your position to be, Mr. Holmes, that the employers are prepared to bargain with the union as of this date even in the absence of filing of the affidavits and statements required under Sections 9(f) (g) and (h)?

Mr. Holmes: That's correct. [2300]

* * *

Trial Examiner Rogosin: The hearing will be in order.

This is a reopened hearing pursuant to an order entered by the Trial Examiner on March 9, 1949, in the matter of International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations, and Waterfront Employers Association of the Pacific Coast, Case No. 20-CB-19, and International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63 and Local 1-40, each affiliated with International Longshoremen's and Warehousemen's Union, C.I.O., and Waterfront Employers Association of the Pacific Coast, Case No. 20-CB-38.

The appearances already entered in the original proceedings I assume are the same here, and as I

understand it there are no appearances to be entered at this time, is that correct?

Mr. Hilton: Yes, sir, that is correct. [2399]

* * *

Mr. Hilton: As General Counsel's Exhibit No. 1-p, the Motion of the General Counsel for Leave to Amend the Complaint and Amendment, together with an attachment, a letter dated December 17, 1948, which is signed by representatives of the Waterfront Employers Association and representatives of the International Longshoremen's and Warehousemen's Union, and in turn attached to the letter an agreement covering the longshoremen.

I might also state at this time that copies of the Motion for Leave to Reopen the Record and the Motion for Leave to Amend the Complaint and the Amendment and attachment were served on counsel for the charging party, Waterfront Employers Association, and on counsel for the Union, Mr. Leonard. They [2400] were sent by registered mail, United States Mail, return receipt requested. I did not bring the receipt with me, nor do I have an affidavit of service, but I assume there is no question but the motions were received by the parties; is that correct?

Mr. Holmes: Correct.

Mr. Leonard: That is correct. I was just trying to find the date. I don't find it here, but they were received in the ordinary course of the mail shortly after the dates they bear. [2401]

* * *

Mr. Hilton: As General Counsel's Exhibit No.

1-u, the Answer to Amendment to Complaint filed on behalf of the Respondents. [2402]

* * *

Trial Examiner Rogosin: Inasmuch as General Counsel's Exhibits 1(o) to 1(u), inclusive, have already been filed with the formal papers, that is prior to the reconvening of this hearing, and have in effect been granted, I shall permit them to be marked and received in evidence as General Counsel's Exhibits 1(o) to 1(u), inclusive. To that extent your objection is overruled. [2405]

* * *

Mr. Hilton: If the Examiner please, I should like to offer in evidence as General Counsel's Exhibit No. 72 the Agreement dated December 17, 1948, between the International Longshoremen's and Warehousemen's Union and the Waterfront Employers Association of the Pacific Coast, which is commonly known and referred to as the Coast Longshore Agreement. Mr. Holmes has submitted copies, mimeographed copies of the Agreement to me, which contains the typed signatures of three representatives of the Waterfront Employers Association, and three printed signatures of representatives of the International Longshoremen's and Warehousemen's Union. It is my understanding that the copy is a true and correct copy of the original agreement which was executed between the parties, and that this agreement was initialed by each of the representatives of the International Longshoremen's and Warehousemen's Union and

the Waterfront Employers Association, that is, Section by Section, it was initialed as it was agreed upon in the original agreement, and that the face sheet on General Counsel's Exhibit No. 72 containing the typed signatures, the original was in fact signed by each of the representatives of the [2449] respective organizations on December 17, they actually signed this agreement. [2450]

* * *

Trial Examiner Rogosin: General Counsel's Exhibit 72 for identification may be received and so marked subject to the comments of counsel, and your right to check against the originals.

* * *

(The document heretofore marked General Counsel's Exhibit No. 72 for identification was received in evidence.) [2451]

GENERAL COUNSEL'S EXHIBIT No. 72

Agreement

This Agreement, dated December 6, 1948, by and between the Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of California, Waterfront Employers of Oregon and Columbia River, Waterfront Employers of Washington, hereinafter designated as the Employers, on behalf of their respective members, and the International Longshoremen's and Warehousemen's Union, hereinafter designated as the Union.

Witnesseth:

This Agreement shall become effective on December 6, 1948, and shall remain in effect, unless terminated in accordance with other provisions in the agreement, or unless the termination date is extended by mutual agreement, until and including June 15, 1951, and shall be deemed renewed thereafter from year to year unless either party gives written notice to the other of a desire to modify or terminate the same, said notice to be given at least sixty (60) days prior to the expiration date. Negotiations shall commence within ten (10) days after the giving of such notice.

Section 7

Hiring Hall, Registration and Preference

(a) Hiring Hall

(1) The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union and the respective Employers Associations. The hiring and dispatching of all longshoremen shall be through one central hiring hall in each of the ports, with such branch halls as shall be mutually agreed upon in accord with provisions of Section 14 (c). All expense of the dispatching halls shall be borne one-half by the International Longshoremen's and Warehousemen's Union and one-half by the Employers.

(2) Each longshoreman registered at any hiring hall who is not a member of the International

Longshoremen's and Warehousemen's Union shall pay to the Union toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the Union.

(3) Non-Association employers shall be permitted to use the hiring hall only if they pay to the Association for the support of the hiring hall the equivalent of the dues and assessments paid by Association members. Such non-member employer shall have no preference in the allocation of men, but when there are not sufficient men available to handle all the needs of the port shall be allocated men on the same basis as men are allocated to Association members.

(b) Hiring Hall Personnel

(1) The personnel for each hiring hall, with the exception of Dispatchers, shall be determined and appointed by the Labor Relations Committee of the port. Dispatchers shall be selected by the Union through elections in which all candidates shall qualify according to standards prescribed and measured by the Labor Relations Committee of the port. If they fail to agree on the appropriate standards or on whether a candidate is qualified under the standards, the dispute shall be decided in accord with provisions of Section 14 (a). The standards for Dispatchers shall be uniform among the several ports insofar as possible.

(2) All Dispatchers hereafter elected shall be

permitted to hold office for the duration of this agreement, excepting only in those ports where dispatching is done on a part-time basis by a person holding union office and acting in a dual capacity.

Neither the constitution nor any rule of the Union or any of its locals shall abridge the foregoing provision.

(3) All personnel of the Hiring Hall, including Dispatchers, shall be governed by rules and regulations agreed upon by the Port Labor Relations Committee, and shall be removable for cause by the Port Labor Relations Committee.

(4) The employer, when desired, shall be permitted to maintain a representative in the Hiring Hall at all times.

(c) Registration

(1) The Port Labor Relations Committee in any port shall have control over registration lists in that port, including the power to make additions to or subtractions from the registration lists as may be necessary.

(2) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail.

(3) Longshoremen not on the registration list shall not be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work.

(d) Preference

Preference of employment shall be given to members of the International Longshoremen's and Warehousemen's Union whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. This section shall not deprive the Employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefore) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.

Admitted April 19, 1949.

Mr. Hilton: I should like to offer in evidence as General Counsel's Exhibit No. 73 the Agreement signed between the International Longshoremen's and Warehousemen's Union and the Waterfront Employers Association of the Pacific Coast, which is commonly referred to as the Coast Agreement covering the ships clerks. On the face of the exhibit there is a letter containing typed signatures of representatives of the Waterfront Employers Association of the Pacific Coast, and typed signatures of representatives of the Union designated as the Ship Clerks Committee for International Longshoremen's and Warehousemen's Union. The face sheet is dated January 17, 1949.

Like the previous exhibit, Mr. Holmes, at my request, submitted this copy to me, and it is my

understanding that it is a true and correct copy of the original agreement which was entered into between these parties, and that the typed signatures of each of the parties appearing on the face sheet were actually signed by each of the parties on the original agreement.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 73 for identification.)

Trial Examiner Rogosin: General Counsel's Exhibit 73 for identification may be received subject to the same reservation as General Counsel's Exhibit 72.

Mr. Leonard: Thank you. [2452]

(The document heretofore marked General Counsel's Exhibit No. 73 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 73

Ship Clerks Master Agreement

The International Longshoremen's and Warehousemen's Union, acting on behalf of the Marine Clerks Association Local 63; Ship Clerks Association Local 34; Super-Cargoes and Checkers Union Local 40; ILWU Local 46, hereinafter designated as the Union, and The Waterfront Employers Association of the Pacific Coast on behalf of the Waterfront Employers Association of California and the Waterfront Employers of Oregon and

Columbia River, hereinafter designated as the Employers, hereby agree as follows:

Section 1:

This agreement as supplemented by agreements for the various port areas covered hereby shall constitute the collective bargaining agreement between the parties hereto.

Section 2—Coverage:

(a) The provisions of this agreement shall apply to all employees who are employed by members of the Employers Associations to spot* cargo on piers or terminals from land or water carriers, receive, deliver, check the loading or discharging of cargo to or from marine terminals (including piers and wharves**) or vessels in Oregon and Columbia River, San Francisco Bay Area, Hueneme, Los Angeles-Long Beach Harbor and San Diego. Executives as defined in port supplements are not subject to the provisions of this agreement.

(b) The job classifications covered by this agreement are herein set forth in the respective port agreements under the subheading "Classifications."

(c) If any employer shall hereafter sub-contract work covered by this agreement, provision shall be made for the observance of this agreement.

Section 3—Preference of Employment:

Preference of employment shall be given to mem-

*In Oregon and Columbia River Port Area: (to spot and weight).

**In San Francisco Bay Area only: (piers, wharves and grain elevators).

bers of the Union. (Registration shall continue on a portwide basis as provided in Section 17 of this agreement.)

Admitted April 19, 1949.

* * *

Mr. Hilton: Now, as General Counsel's Exhibit 73 (a) I would like to offer in evidence the Port Supplementary Agreement covering the Los Angeles-Long Beach area which bears the typed signature of representatives of the Water Employers Association of California and the Marine Clerks Association, Local 1-63, ILWU. Again I have been advised that this is a true and correct copy of the Clerks Supplementary Agreement by Mr. Holmes, and that the typed signatures appearing on Page 8 of the agreement were actually signed by each of the parties on the original [2453] agreement.

* * *

Trial Examiner Rogosin: Do you have a date for that agreement, or is the date appearing on the last page intended as the date?

Mr. Hilton: The date is stated in the agreement, executed on the 11th day of March, 1949. [2454]

* * *

Mr. Hilton: I should also like to offer in evidence as General Counsel's Exhibit No. 73(b) the Port Supplement and Working Rules covering Checkers, Supervisors, and Supercargoes at Portland, Oregon. Like the other exhibits I have been

furnished this exhibit by Mr. Holmes, and I have been assured, or I have been informed that it is a true and correct copy of the original agreement that was entered into between these parties. This Port Supplement was executed on the 25th day of March, 1949, and was executed on behalf of the Waterfront Employers of Oregon and Columbia River and the Supercargoes and Checkers, International Longshoremen's and Warehousemen's Union, Local 40. The exhibit contains the typed signatures, or the typed names of the representatives of each of the associations, and I have been informed that each of the individuals signed the original agreement. [2456]

* * *

Trial Examiner Rogosin: General Counsel's Exhibit 73(b) for identification may be received and so marked subject to the objections stated by counsel for Respondent.

(The document heretofore marked General Counsel's Exhibit No. 73(b) for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT 73-B

Port Supplement Agreement
and Working RulesCheckers, Supervisors, and Supercargoes
Portland, Oregon

Effective—March 28, 1949

Section 1. Classifications.

The provisions of this supplemental agreement shall apply to all employees who are employed by members of the Association and shall apply to hourly and monthly checkers, supervisors and supercargoes. (Note: Exception—Where provisions do not apply to supervisors or supercargoes it is so stated.)

Section 2. Definitions.

(a) Checkers: A checker is an employee who receives, delivers, checks, spots, or weighs cargo to or from marine terminals, including piers, wharves or ships. (Basic agreement, Section 2(a).)

(b) Supervisor: A supervisor is an employee who is assigned regularly to the direction or supervision of the work of other checkers, but who may be assigned to the work covered by this agreement, as incidental to his other duties.

(c) Supercargoes: A supercargo is an employee who supervises the loading and/or discharging operations of a vessel. A supercargo is the direct representative of the employer and in conjunction with

other representatives of the employer, is responsible for the safe, efficient and proper handling of cargo and shall have the authority to hire, supervise, place and/or discharge men, and shall perform his duties in accordance with the orders of his employer. A supercargo's duties do not require him to do the work of checkers or supervisors except as incidental to his other duties.

(1) **Checker-Supercargo:** A checker-supercargo is an employee who has been so registered by the Labor Relations Committee as qualified to be employed in either the capacity of a checker or as a supercargo.

(2) There shall be no specified meal hours for men working as supercargoes.

Section 7 (b) of the Basic Agreement shall not apply to supercargoes but it shall be the practice that supercargoes shall not be required to work over five hours without an opportunity to eat except in emergency. There shall be no deduction for lost time other than a meal time.

There shall be no monthly limitation of hours for hourly supercargoes who are registered as straight supercargoes.

One hundred and seventy-three hours shall constitute a month's work for Monthly Supercargoes. More hours may be worked subject to the regulation of the Joint L. R. C. Any hours worked (exclusive of travel time) beyond the 173 hours per calendar month, shall be paid at the prevailing hourly rate of pay.

No supercargo shall work more than 12 hours in any one shift. (This shall not apply when vessel is shifting or sailing or when a vessel continues to work and no replacements are available in the port.)

Section 11 (2) of the Basic Agreement shall not apply to men working as supercargoes. (Work in excess of 11 hours and starting before 7:00 a.m.)

The 1000 hour clause shall not apply to supervisors or supercargoes who receive a guaranteed salary.

(d) Executives: An executive is an employee who is in responsible charge of a vessel, pier, wharf or terminal or a major department thereof in respect to the work covered by this agreement, and duties do not require him to do the work covered herein.

Section 3. Union Preference:—(See Sec 3. Basic)

This section shall not deprive the members of the Joint Labor Relations Committee of their right to object to unsatisfactory men in making additions to the registration list and shall not interfere with the power of the Joint Labor Relations Committee to make appropriate dispatching rules. Registered or permit men may be nominated by either party to this agreement.

Admitted April 19, 1949.

Mr. Hilton: You will note that I am not offering the supplement covering the clerks for the Port of San Francisco. I have been informed that no

such agreement has been executed as of this day covering the clerks in the Port of San Francisco.

Trial Examiner Rogosin: Can there be a matter of stipulation so that the record will be clear on that point?

Mr. Holmes: That is true.

Mr. Leonard: As far as I know that is correct. I am perfectly willing to so stipulate, subject to my calling to the Trial Examiner's attention any error or inaccuracy before the hearing closes if such a matter should be brought to my attention.

Trial Examiner Rogosin: Very well. That is the Ship Clerks of the San Francisco Port?

Mr. Holmes: Port Supplement of San Francisco.

Mr. Hilton: Port Supplement. [2457]

* * *

Mr. Hilton: If the Examiner please, counsel have agreed to stipulate certain facts in lieu of calling witnesses who are present here this morning to testify in respect thereto. One: Counsel have agreed that for the purpose of this proceeding, representatives of the ILWU and the Waterfront Employers' Association reached agreement, in principle, about November 25, on the terms of the agreements which have been received in evidence as General Counsel's Exhibits Nos. 72 and 73, that is, both the Coastwise Longshore Contract, and the Coastwise Clerks Contract.

Thereafter, on December 6th, the pickets were withdrawn, and the men, both the longshoremen,

and the clerks, returned to work. Is that correct, insofar as the agreements are concerned?

Mr. Leonard: That is correct, with one minor correction. The picketing actually ceased about December 2 or 3—sort of petered out. The men did return to work on December 6th.

Mr. Hilton: At least, by December 6th, the pickets had been withdrawn, and the men returned.

Mr. Leonard: Actually, the pickets started to cease picketing prior to December 6th, and after November 25th.

Mr. Hilton: Now, counsel have also stipulated for the purposes of this proceeding, that the registration, hiring, [2462] and dispatching procedures on and after December 6, 1948, are substantially the same as the procedures in existence prior to the strike, which took place on September 2, 1948. Is that correct?

Mr. Leonard: That is correct.

Trial Examiner Rogosin: Does that conclude that stipulation?

Mr. Hilton: That concludes the stipulation.

Mr. Holmes: I join in the stipulation.

Trial Examiner Rogosin: It may be so stipulated.

* * *

Received May 4, 1949. [2463]

[Title of Board and Cause.]

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 02.87, Rules and Regulations of the National Labor Relations Board—Series 6, as amended hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “In the Matter of International Longshoremen’s and Warehousemen’s Union, affiliated with the Congress of Industrial Organizations and Waterfront Employers Association of the Pacific Coast” and “In the Matter of International Longshoremen’s and Warehousemen’s Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34 and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, each affiliated with International Longshoremen’s and Warehousemen’s Union, C.I.O., and Waterfront Employers Association of the Pacific Coast,” the same being known as Cases Nos. 20-CB-19 and 20-CB-38 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Irving Rogosin Trial Examiner for the National Labor Relations Board dated September 1, 1948.

(2) Stenographic transcript of testimony taken before Trial Examiner Rogosin on September 1, 2, 3, 7, 15, 16, 20, 21, 22, 23, 24, 27, 28, 29, 30, 1948, October 25, 26, 27, and 28, 1948, together with all exhibits introduced in evidence, also all rejected exhibits.

(3) Charging party's letter, dated October 8, 1948, opposing Respondents' request for special permission to appeal. (Respondents' request for special permission to appeal is General Counsel's Exhibit No. 1-K, found in Volume V of certified record.)

(4) General Counsel's request for extension of time for filing brief before the Trial Examiner dated November 15, 1948.

(5) Copy of Chief Trial Examiner's telegram dated November 16, 1948, granting all parties extension of time for filing briefs before the Trial Examiner.

(6) Respondents' telegram, dated November 30, 1948, requesting further extension of time for filing brief before the Trial Examiner.

(7) Copy of Chief Trial Examiner's telegram dated December 1, 1948, granting all parties further extension of time for filing briefs.

(8) General Counsel's motion for leave to re-open record, dated February 9, 1949, for the purpose of receiving in evidence the motion for leave to amend complaint accompanied by the proposed

amendment and to adduce additional evidence relating to the negotiation, execution, performance and operation of certain agreements, set forth in said motion for leave to amend.

(9) General Counsel's motion for leave to amend complaint and amendment, dated February 9, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(10) Trial Examiner's order to show cause why said motion should not be granted, the hearing reopened, the motion to amend, and amendment, be allowed, and an opportunity afforded said parties to adduce additional evidence relating to the issues raised by said amendment, dated February 16, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(11) Respondents' letter, received February 16, 1949, requesting still further extension of time for filing brief before the Trial Examiner.

(12) Copy of Chief Trial Examiner's telegram, dated February 16, 1949, granting all parties still further extension of time for filing briefs.

(13) Trial Examiner's order reopening hearing, granting motion to amend complaint, and setting date for reconvening hearing, dated March 9, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(14) Respondents' answer to amendment to complaint, dated March 14, 1949.

(15) Respondents' supplement motion to dis-

miss amendment to the complaint, dated March 14, 1949.

(16) Respondents' telegram dated March 15, 1949, requesting further postponement of hearing date.

(17) Copy of Trial Examiner's telegram, dated March 18, 1949, denying Respondents' request for further postponement of hearing date.

(18) Copy of Trial Examiner's telegram, dated March 31, 1949, postponing time for reopened hearing.

(19) Copy of Trial Examiner's telegram, dated April 11, 1949, further postponing time for reopened hearing.

(20) Stenographic transcript of testimony taken before Trial Examiner Rogosin in reopened hearing on April 20 and 21, 1949, together with all exhibits introduced in evidence, also all rejected exhibits. (Transcript attached to Volume IV of the certified record.)

(21) Respondents' request for special permission to appeal directly to Board from rulings of the Trial Examiner refusing to consent to a withdrawal of charges and from rulings of the Trial Examiner denying Respondents' motions to dismiss received May 3, 1949.

(22) General Counsel's opposition to Respondents' request for special permission to appeal to Board, dated May 5, 1949.

(23) General Counsel's request for still further extension of time for filing brief before the Trial Examiner, dated May 9, 1949.

(24) Board's order, denying Respondents' request for special permission to appeal directly to the Board, dated May 17, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(25) Copy of Trial Examiner Rogosin's Intermediate Report, dated November 30, 1949, (annexed to item 35 hereof); order transferring case to the Board, dated November 30, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(26) Respondents' telegram, dated December 12, 1949, requesting extension of time for filing exceptions and brief, also requesting permission to argue orally before the Board. (Respondents' request for oral argument denied, see Board's Decision and Order dated July 20, 1950, Page 2.)

(27) Copy of Board's telegram, dated December 12, 1949, granting all parties extension of time for filing exceptions and briefs.

(28) Respondents' telegram, dated December 29, 1949, requesting further extension of time for filing exceptions and brief.

(29) Copy of Board's telegram, dated December 30, 1949, granting all parties extension of time for filing exceptions.

(30) General Counsel's exceptions to the Intermediate Report received January 3, 1950, together with affidavit of service and United States Post Office return receipts thereof.

(31) Respondents' exceptions to the Intermediate Report, received January 9, 1950.

(32) Respondents' telegram, dated January 11,

1950, requesting still further extension of time for filing brief.

(33) Copy of Board's telegram, dated January 17, 1950, granting all parties still further extension of time for filing briefs.

(34) Respondents' motion to reopen record, received January 19, 1950. (Denied, see Board's Decision and Order, dated July 20, 1950, page 2, footnote 2.)

(35) Copy of Board's Decision and Order, dated July 20, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 16th day of April, 1951.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 12907. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Longshoremen's & Warehousemen's Union, Affiliated With the Congress of Industrial Organizations; International Longshoremen's and Warehousemen's Union, District No. 1, Acting on Behalf of Ship Clerks Association, Local 34 and Local 34; Marine Clerks Association Local, 1-63 and Supercargoes and Checkers Union, Local 40, Each Affiliated With the International Longshoremen's & Warehousemen's Union, C.I.O., Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed April 20, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12907

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, AFFILI-
ATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATIONS; INTER-
NATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
No. 1, Acting on Behalf of SHIP CLERKS
ASSOCIATION, LOCAL 34, and LOCAL 34
MARINE CLERKS ASSOCIATION, LOCAL
1-63; and SUPERCARGOES AND CHECK-
ERS UNION, LOCAL 40, Each Affiliated
With the INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION
C.I.O.,

Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant
to the National Labor Relations Act, as amended
(61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151

et seq.) hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, each affiliated with International Longshoremen's and Warehousemen's Union, C.I.O., their officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "In the Matter of International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations and Waterfront Employers Association of the Pacific Coast, Case No. 20-CB-19," and "In the Matter of International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34 and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, each affiliated with International Longshoremen's and Warehousemen's Union, C.I.O., and Waterfront Employers Association of the Pacific Coast, Case No. 20-CB-38."

In support of this petition the Board respectfully shows:

(1) Respondents are labor organizations engaged in promoting and protecting the interests of

their members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on July 20, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondents, their officers, representatives, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Longshoremen's and Warehousemen's Union, affiliated with the Congress of Industrial Organizations; International Longshoremen and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63, and Supercargoes and Checkers Union, Local 40, each affiliated with International Longshoremen's and Warehousemen's Union, C.I.O., their officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving effect to those provisions of the collective bargaining contracts between the Respondents and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, Waterfront Employers Association of California, and Waterfront Employers of Oregon and Columbia River, and their respective members or successors, which grant preference in employment to members of any of the Respondents;

(b) In any like or related manner causing or attempting to cause the Employers to discriminate against employees in violation of Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places copies of the notice attached hereto, marked Appendix A,¹¹ at all places where notices to members are customarily posted. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondents' representatives, be posted by the Respondents immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by them to insure

¹¹In the event that this Order is enforced by decree of a United States Court of Appeals there shall be inserted before the words: "A Decision and Order," the words: "A Decree of the United States Court of Appeals Enforcing."

that said notices are not altered, defaced, or covered by any other material;

(b) Furnish the Regional Director for the Twentieth Region signed copies of the form of notice attached hereto as Appendix A, for posting, with the consent of the Employers, on bulletin boards at their offices, and in all other places where notices are customarily posted by said Employers. The notices shall be posted for a period of sixty (60) consecutive days thereafter. Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed as provided in paragraph 2 (a) hereof, be forthwith returned to the Regional Director for said posting;

(c) Notify the Regional Director for the Twentieth Region, in writing within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

(3) On July 20, 1950, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable

Court that it cause notice of the filing of this petition and transcript to be served upon Respondents that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondents, their officers, representatives, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 16th day of April, 1951.

APPENDIX A

Notice to All Officers, Representatives, Agents, and Members of International Longshoremen's and Warehousemen's Union; International Longshoremen's and Warehousemen's Union, District No. 1; Ship Clerks Association, Local 34, and Local 34; Marine Clerks Association, Local 1-63; and Supercargoes and Checkers Union, Local 40, Each Affiliated With International Longshoremen's and Warehousemen's Union, Affiliated with the Congress of Industrial Organizations

PURSUANT TO A DECISION AND ORDER of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not give effect to those provisions of the collective bargaining contracts between the above unions and the Waterfront Employers Association of the Pacific Coast, on behalf of itself, and the other Regional Associations, the said Regional Associations, and their respective members, which grant preference of employment to members in the said unions or any of them.

We Will Not in any like or related manner cause, or attempt to cause, the Employers or their successors, to discriminate against employees in violation of Section 8(a) (3) of the Act.

Dated

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, CIO,

By,
(Representative) (Title)

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, DISTRICT
NO. 1,

By,
(Representative) (Title)

SHIP CLERKS ASSOCIA-
TION, LOCAL 34

By
(Representative) (Title)

MARINE CLERKS ASSOCIA-
TION, LOCAL 1-63,

By
(Representative) (Title)

SUPERCARGOES AND CHECKERS UNION,
LOCAL,

By
(Representative) (Title)

This notice must remain posted for 60 days from
the date hereof, and must not be altered, defaced,
or covered by any other material.

[Endorsed]: Filed April 20, 1951.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION FOR REVIEW OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Come now the respondents above named and in answer to the petition for enforcement of an order of the National Labor Relations Board heretofore filed in the above-entitled matter by said Board, allege as follows:

1. Respondents admit that they are labor organizations engaged in promoting and protecting the interests of their membership in the State of California and within this judicial circuit.

2. Respondents admit that there was conducted before the National Labor Relations Board a consolidated proceeding styled and captioned as in the said petition alleged.

3. Respondents admit that upon all the proceedings had in said matter before the said Board, the Board on July 20, 1950, did make its order as in the said petition alleged.

4. Respondents admit that copies of said order were served upon respondents as in said petition alleged.

5. Respondents deny that they have committed

any unfair labor practices, either as in the said petition, order and proceedings alleged, or otherwise.

6. Respondents allege that there is no substantial evidence, or any evidence, to support the findings made and order issued by the Board in the aforesaid proceeding.

As and for a Further Answer to the Aforesaid Petition, and by Way of Cross-Petition for Review of the Aforesaid Order, respondents allege as follows:

1. That the aforesaid proceedings before the Board were instituted by the filing of a charge on June 10, 1948, and an amended charge on August 10, 1948; that thereafter, no other or further or amended charges were ever filed in the said proceedings and that the aforesaid charges of June 10, 1948, and August 20, 1948, true and correct copies of which have been certified to this Court by the National Labor Relations Board, petitioner herein, were and are the only charges ever filed in these proceedings.

2. That neither of the aforesaid charges alleged, charged, or complained that the respondents had or have violated the National Labor Relations Act, as amended, or any section thereof, by the alleged execution and alleged enforcement of collective bargaining contracts allegedly granting preference of employment to members of the respondents; that on the contrary the said charges and each of them

alleged, charged, and complained that the respondents were in violation of the said Act by refusing to bargain in good faith with the charging parties.

3. That the Board's Trial Examiner specifically found, on all of the evidence before him, that the respondents did not refuse and never had refused to bargain in good faith with the charging parties; that no exceptions were ever taken to said findings by any of the parties to the aforesaid proceedings and that the Board adopted the said findings and made them its own.

4. That despite the fact that no charge was ever filed concerning the alleged execution or enforcement of collective bargaining contracts allegedly granting preference of employment to members of the respondents, the Board made findings and issued an order against the respondents as though a charge or charges were or had been filed relating thereto. Objections to said procedure and to the making of such findings and order were urged by the respondents in the proceedings before the Trial Examiner and the Board.

5. The finding of the Board and the order based thereon relating to matters which were not the subject of any charge filed against the respondents was and is contrary to and in violation of the National Labor Relations Act, as amended, and particularly Section 10(b) thereof; was and is a denial to the respondents of due process of law; and did and does deprive respondents of valuable property rights, to wit: contractual rights for and on behalf of their members, without due process of law.

Wherefore, respondents pray that the petition for enforcement of an order of the National Labor Relations Board be denied and that, upon respondents' petition for review of said order, said order be vacated and set aside.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ NORMAN LEONARD,
Attorneys for Respondents.

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says: That he is one of the attorneys for respondents in the within action; that he makes this verification for and on behalf of said respondents, as such attorney; that he has read the foregoing answer and petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

/s/ NORMAN LEONARD.

Subscribed and sworn to before me this 15th day of May, 1951.

[Seal] /s/ PEASE STOCKWELL,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 14, 1953.

[Endorsed]: Filed May 16, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following point:

The Board properly found that respondents, by entering into and participating in the enforcement of a contract containing a provision which requires that hiring preference be given to respondents' members, violated Section 8 (b) (2) of the Act in that they caused the employers to discriminate respecting their employees' membership or non-membership in a labor organization.

Dated at Washington, D. C., this 16th day of April, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

[Endorsed]: Filed April 20, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: International Longshoremen's & Warehousemen's Union, CIO, San Francisco, Calif., International Longshoremen's & Warehousemen's Union, District No. 1, CIO, San Francisco, and Waterfront Employers Association of the Pacific Coast, Att.: Mr. Henry W. Clark, 16 California Street, San Francisco, California

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 20th day of April, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on July 20, 1950, in a proceeding known upon the records of the said Board as

“In the Matter of International Longshoremen's & Warehousemen's Union, affiliated with the Congress of Industrial Organizations and Waterfront Employers Association of the Pacific Coast Case No. 20-CB-19, and In the Matter of International Longshoremen's & Warehousemen's Union, District No. 1, etc., CIO and Waterfront Employers Ass'n of the Pacific Coast, Case No. 20-CB-38”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 20th day of April in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Returns on Service of Writ attached.

Received April 25, 1951, U. S. Marshal.

[Endorsed]: Filed May 9, 1951.

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION, AFFILIATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATIONS, INTERNATIONAL LONG-
SHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT
No. 1, ACTING ON BEHALF OF SHIP CLERKS ASSOCI-
TION, LOCAL 34 AND LOCAL 34, MARINE CLERKS
ASSOCIATION, LOCAL 1-63, AND SUPER CARGOES AND
CHECKERS UNION, LOCAL 40, EACH AFFILIATED WITH
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION, C. I. O., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

FREDERICK U. REEL,

THOMAS F. MAHER,

*Attorneys,
National Labor Relations Board.*

FILED

DEC 31 1951



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In the United States Court of Appeals for the Ninth Circuit

No. 12907

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION, AFFILIATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATIONS, INTERNATIONAL LONG-
SHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT
No. 1, ACTING ON BEHALF OF SHIP CLERKS ASSOCIA-
TION, LOCAL 34 AND LOCAL 34, MARINE CLERKS
ASSOCIATION, LOCAL 1-63, AND SUPER CARGOES AND
CHECKERS UNION, LOCAL 40, EACH AFFILIATED WITH
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE-
MEN'S UNION, C. I. O., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 51, *et seq.*),¹ for the enforcement of its order (R.

¹ Relevant provisions of the Act appear in the Appendix, *infra*, p. 14-18.

382-389) issued on July 20, 1950, against the respondents herein,² following the usual proceedings under Section 10 of the Act. The Board's Decision and Order are reported in 90 N. L. R. B. 1021. This Court has jurisdiction under Section 10 of the Act, the unfair labor practices having occurred within this judicial circuit.

STATEMENT OF THE CASE

Following the customary proceedings under Section 10 of the Act, the Board found that the respondent unions violated Section 8 (b) (2) of the Act by causing the Employers³ to discriminate against nonmembers of the unions in violation of Section 8 (a) (3). The issues before this Court are:

(1) Whether the Board properly found that respondents, by entering into and enforcing contracts

² International Longshoremen's and Warehousemen's Union, CIO; International Longshoremen's and Warehousemen's Union, District No. 1, acting on behalf of Ship Clerks Association, Local 34 and Local 34, Marine Clerks Association, Local 1-63, and Super Cargoes and Checkers Union, Local 40.

³ The Employers, charging parties in this case, are members of the following associations: Waterfront Employers Association of the Pacific Coast (WEA), Waterfront Employers Association of California (WEAC), Waterfront Employers of Oregon, and the Columbia River (WEOC) (R. 230-235). The individual employer members of these employer associations are enumerated in an appendix to the Trial Examiner's recommended findings at pages 200-212 of the record. Each of the employers, in the course and conduct of its operations, caused and causes a large number of passengers and a substantial tonnage of cargo to be transported to and from various ports on the Pacific Coast, and between such ports and various ports on the East Coast and in the Territories of the United States, and to foreign ports over the customary world trade routes (R. 65-68; 235-240). The Board's jurisdiction is not in issue.

requiring that hiring preference be given to respondents' members, caused the Employers to discriminate respecting employees' membership or nonmembership in a labor organization; and

(2) Whether, following the issuance of a complaint upon unfair labor practice charges, the General Counsel may during the course of the hearing amend the complaint to allege newly committed unfair labor practices which have grown out of those involved in the original charge and complaint.

I

The Board's findings and conclusions ⁴

A. Background

Since 1938 the International Longshoremen's and Warehousemen's Union, and certain of its constituents, collectively referred to as respondents, and certain other constituent bodies not parties to the instant proceeding, represented the employees of the Employers herein, in units determined by the Board to be appropriate for collective bargaining purposes. 7 N. L. R. B. 1002; 71 N. L. R. B. 80; 71 N. L. R. B. 121. Collective bargaining agreements between the parties have been in force during the intervening period, and one provision of the latest of such agreements forms the basis for the Board's order in these proceedings (R. 70; 229-230, 232-233, 357, 361-365). The fundamental structure of these agreements is based upon the provisions of an arbitration award rendered in

⁴ In the following statement references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

1934 by the National Longshoremen's Board appointed by the President of the United States to mediate an extended strike then in progress (R. 69-71; 267-268, 357). As a direct result of this 1934 award and the subsequent agreements based upon it, the hiring methods and personnel practices in the Longshore industry have developed to their present form (R. 71-85; 330-331). Thus, the inauguration of the joint hiring halls, the establishment of Labor Relations Committees, comprised of union and employer members and headed by impartial chairmen, the selection of hiring hall personnel, and the manner in which employees were registered in the hiring halls and dispatched to job assignments were all embodied in the original award, and have consistently remained in force in all subsequent agreements including those terminating in June 1948, and generally referred to as the Coast Longshore Agreement (R. 71-85; 264-273, 356). Insofar as here relevant the Agreement provided, in substance, that the Employers when hiring would extend preference to Union members, and would hire nonunion employees only when Union members were not available for employment (R. 36, 100; 264-273, 284-285).

B. The 1948 negotiations

On February 13, 1948, the Employers suggested to the respondent Unions that an early conference be held respecting the renewal of the existing agreements in order that due consideration could be given to the problem of conforming existing contracts to the provisions of the Labor-Management Relations Act, 1947,

which had been enacted during the pendency of the then current contracts (R. 103-104; 246-248). Specifically the Employers contended that after June 15, 1948, the terminal date of the contract, the provisions in the Coast Longshore Agreement relating to preference of employment, control of registration, and the hiring hall, would conflict with the Act and that it would be necessary to modify the contract and the various port supplements, to conform to the law (R. 104; 247-248).

Negotiations between the parties began on February 21, 1948, and continued through September 1, at which time, upon the failure of the parties to arrive at an agreement, a strike was called by the respondent labor organizations (R. 104-128; 249-251, 337-338, 354-355). As a consequence of this action all longshore work on the Pacific Coast waterfront ceased, and for the remaining 97 days of the strike commercial shipping on the West Coast was at a virtual standstill (R. 128-130; 337-338, 355).

On or about November 25, representatives of the respondent and the WEA reached agreement, in principle, on the Coast Longshore and Ship Clerks contracts. Beginning about December 2 or 3, picketing diminished. By December 6, pickets were wholly withdrawn, and the longshoremen and ship clerks returned to work. The strike was finally settled on December 6, 1948. (R. 134-135; 373-374.)

C. The hiring preference clause in the contracts

The Coast Longshore contract between the WEA and respondent ILWU, was dated December 6, 1948

(R. 135; 361-365); the Ship Clerks contract, January 17, 1949 (R. 135; 366-368). A Port Supplement to the Ship Clerks contract, between the WEAC and the Marine Clerks Association, Local 1-63, covering the Los Angeles-Long Beach area, was executed March 11, 1949 (R. 135; 368, 373), a Port Supplement and Working Rules, between the WEOC and respondent Checkers and Super Cargoes Local No. 40, covering checkers, supervisors and supercargoes at Portland, Oregon, on March 25, 1949 (R. 135; 370-372). As of the date of the close of the hearing of this case before the Board on April 21, 1949, no Port Supplement covering ship clerks in the Port of San Francisco had been executed (R. 135; 372-373).

Upon the suggestion of respondents' representatives during the negotiations, hiring preference in behalf of the members of respondents' labor organization was provided for in the several agreements entered into by the respondents and the Employers. Thus on August 28, 1948, the Employers advised the respondent ILWU of their "willingness to follow, in substance, the proposal made * * * on March 24, 1948, to continue the present provisions of the contract concerning * * * preference of employment provisions * * *" (R. 37-38; 340). Thereafter on August 31 the Union without specifically noting the Employers' acquiescence in the March 24 proposal, simply reaffirmed it by stating that it proposed the parties "continue the present [preference] provision as is" (R. 37-38; 350). This preference clause as it

appears in the Coast Longshore Agreement, the master contract signed on December 6, 1948, provided as follows:

Section 7.—*Hiring hall, registration, and preference.*

* * * *

(d) *Preference.*

Preference of employment shall be given to members of the [ILWU] whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. This section shall not deprive the Employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules (R. 35-36; 365).

The other agreements contained preference clauses substantially in accord with the quoted provisions from the Master Contract (R. 35; 367-368, 372).

At the hearings in this case before the Board it was stipulated between the parties that the registration, hiring, and dispatching procedures then in force were given the same effect as under previous contracts (R. 36; 374). As a result, the Board found, members of respondents' organizations have received preference in employment over nonmembers (R. 36, 156).

Accordingly the Board concluded that by thus entering into contracts which discriminatorily granted preference in employment to members of respondents' organizations, and by actively participating in

the enforcement of such provisions, respondents caused the Employers to discriminate against non-member employees in violation of Section 8 (a) (3) of the Act and thereby violated Section 8 (b) (2) of the Act (R. 36).

II

The proceedings before the Board

Upon an original charge filed by the Employers with the Board on June 10, 1948, alleging that the Unions had violated Section 8 (b) (2) and (3) of the Act, and upon an amended charge filed on August 20, 1948, alleging that the Unions had violated Section 8 (b) (1), the Board on August 20, 1948, issued its complaint (R. 3-15). Insofar as here relevant the charges and the complaint alleged that the Unions by demanding and seeking to enter into a contract with the Employers which provided for preferential hiring of Union members had *attempted to cause* the Employers to discriminate against their employees in violation of Section 8 (a) (3) and had thereby violated Section 8 (b) (2).⁵ Thereafter, during the course of the hearing before the Trial Examiner, the complaint was amended to allege that the Unions by actually entering into the aforementioned contracts with the Employers securing preferential hiring of the Unions' members had further attempted to cause and *had caused* the Employers to discriminate against

⁵ Briefly stated, Section 8 (a) (3) prohibits employers from discriminating in favor of union members, and Section 8 (b) (2) prohibits unions from *causing or attempting to cause* an employer to violate Section 8 (a) (3). The full text of these provisions is set forth *infra*, pp. 14-15.

their employees in violation of Section 8 (a) (3) thus further violating Section 8 (b) (2) of the Act (R. 25-29). The Trial Examiner and the Board rejected respondents' contention that the absence of an amended *charge* alleging the execution of the illegal contracts precluded the General Counsel from amending the *complaint* to allege the subsequent violation (R. 34-35, 54-56). Accordingly the Board, as noted above, found that by entering into and actively participating in the enforcement of contracts providing for preferential hiring of Union members, respondents caused the Employers to violate Section 8 (a) (3), thereby violating Section 8 (b) (2).

III

The Board's order

The Board's order requires respondents to cease and desist from giving effect to those provisions of collective bargaining agreements between respondents and the Waterfront Employers Association on behalf of itself, and the Waterfront Employers Association of California, the Waterfront Employers of Oregon and Columbia River, and their respective members or its successors, which grant preference in employment to members of any of the respondents. The Board further ordered respondents to cease and desist from causing or attempting to cause the Employers to discriminate against their employees in any like or related manner. The order also requires respondent to post the customary notices of compliance with the Board's order (R. 40-42).

ARGUMENT

POINT I

The Board properly found that respondents by entering into and enforcing a contract requiring that hiring preference be given respondents' members caused the Employers to violate Section 8 (a) (3) of the Act

The facts summarized above, pp. 3-7, establish that respondents entered into a contract with the Employers under which Union members were to be given preference in hiring, that respondents assisted in the enforcement of the preferential hiring provisions, and that as a result members of respondents received preference in employment over nonmembers. The mere execution of such a contract, even apart from its actual enforcement, constitutes "discrimination in regard to hire" on the part of the Employers and hence falls squarely within the prohibition of Section 8 (a) (3), as this Court early recognized in *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 660. Since the respondent Unions joined in the execution of these illegal contracts and assisted in enforcing them, it follows that the Unions "cause[d] * * * an employer to discriminate against an employee in violation of [Section 8 (a) (3)]", thus violating Section 8 (b) (2).⁶ *N. L. R. B. v. National Maritime Union of America*, 175 F. 2d 686, 689 (C. A. 2), cer-

⁶ There is no suggestion that the Employers by economic pressure upon the respondents compelled them to execute the contracts. But even had the unions been subjected to such "economic duress" this would "afford them no defense," as this Court recently observed in *N. L. R. B. v. Fry Roofing Co.*, No. 12775, decided November 30, 1951; see also cases cited in n. 5 of the decision in the *Fry* case.

tiorari denied, 338 U. S. 954; *International Union, United Mine Workers of America v. N. L. R. B.*, 184 F. 2d 392 (C. A. D. C.), certiorari denied, 340 U. S. 934; *N. L. R. B. v. American Radio Ass'n* (C. A. 2), consent decree entered December 28, 1950, enforcing 32 N. L. R. B. 1344.⁷

POINT II

The amendments to the complaint offered at the hearing with respect to recent violations growing out of the matters then in litigation were valid and proper

As stated above, p. 8, the original complaint alleged that respondents violated Section 8 (b) (2) by attempting to cause the Employers to violate Section 8 (a) (3). Respondents in their Answer denied violating that Section and attacked its validity (R. 17-19). At the hearing before the Trial Examiner, the General Counsel amended the complaint to allege that by executing and enforcing the contracts in question respondents had further violated Section 8 (b) (2) by causing the employer to violate Section 8 (a) (3). Respondents in this Court renew their contention that the amendment was improper in the absence of a supporting charge (R. 31, 392).

The propriety of thus amending the complaint is established by the Supreme Court's decision in *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 69, where the Court stated that nothing in the Act—

⁷ The proviso to Section 8 (a) (3) permitting under certain conditions the execution and enforcement of contracts requiring union membership as a condition of employment furnishes no defense in the instant case, for the agreements here in issue resulted in discrimination in *hiring* and did not allow the thirty-day period required by the proviso. See *infra*, p. 14.

precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt * * * to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken.

See also *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 225. The rule is unchanged under the amended Act; see *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413, 415 (C. A. 10); *N. L. R. B. v. Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (C. A. 5); *American Shuffleboard Co. v. N. L. R. B.*, 190 F. 2d 898, 903-904 (C. A. 3); *N. L. R. B. v. Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *Cathey Lumber Co.*, 86 NLRB 157, 162, enforced 185 F. 2d 1021 (C. A. 5), decree vacated on other grounds, 189 F. 2d 428; *N. L. R. B. v. Bradley Washfountain Co.*, 29 L. R. R. M. 2064, 2067 (C. A. 7, decided November 1, 1951). As the court stated in the case last cited:

Under the present act, as well as its predecessor, the function of the charge is to set in motion the Board's investigatory machinery in order to ascertain whether a complaint shall issue; it is not a pleading; it has served its purpose when the Board embarks upon an in-

quiry. [Citing cases.] The controversy between the Board and the employer begins with the complaint prepared by the Board. [Citing case.] *Consequently it is without significance that the complaint was broader than the original charge.* The latter called upon the Board to make inquiry and, if thought proper, to file a complaint. In pursuance of its administrative duty, the Board, in due course, issued its complaint and thereupon the controversy between the Board and respondent came into existence. Nothing that transpired before the filing of the complaint in anywise limited the right of the Board to include in it the specific charges which it contained. [Emphasis supplied.]^s

CONCLUSION

The Board properly found that respondents had violated Section 8 (b) (2) and its order, which is in the customary form, should be enforced.

Respectfully submitted.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

FREDERICK U. REEL,

THOMAS F. MAHER,

Attorneys,
National Labor Relations Board.

JANUARY 1952.

^s See also *N. L. R. B. v. Kobritz*, C. A. 1, No. 4581, decided December 17, 1951, slip opinion, pp. 10-15.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*),⁹ are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an

⁹ The Act was further amended, in a manner not material here by Public Law 189, 82nd Cong., 1st Sess., enacted October 22, 1951

agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent

or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(c) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or

agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 12908

United States
Court of Appeals

for the Ninth Circuit

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of
Hacker-Byrnes Corporation, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division



No. 12908

United States
Court of Appeals
for the Ninth Circuit

J. J. McDONELL,

Appellant,

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NAMES AND ADDRESSES OF
ATTORNEYS

For Appellant:

BENJAMIN & KRONICK,
1425 Chapman Bldg.,
456 S. Broadway,
Los Angeles 14, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,
817, 111 West 7th Street,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California,
Central Division

In Bankruptcy No. 47485-M

In the Matter of

HACKER-BYRNES CORPORATION,
Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia:

The verified petition filed by Murray B. Marsh
Co., Inc., Edward J. Roberts Co., Inc., and Century
Floor Coverings, Inc., respectfully shows:

I.

That the alleged bankrupt, Hacker-Byrnes Cor-
poration, which now has, and has had its principal
place of business at 1240 South Broadway, Los An-
geles, California in the Southern District of Cali-
fornia within the judicial district above named for
a period of the greater portion of the six months
immediately preceding the filing of this petition.

II.

That the alleged bankrupt is engaged in the whole-
sale and retail selling of floor coverings at the said

address and is not a wage earner, farmer, banking institution, insurance company or building and loan company.

III.

That your petitioners are creditors of said alleged bankrupt and hold provable claims against it, fixed as to liabilities [2] and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by them, to the sum of more than \$500.

IV.

That the nature and amount of your petitioners' claims are as follows:

That the alleged bankrupt is indebted to your petitioner, Murray B. Marsh Co., Inc., in the sum of \$26,657.20 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$26,657.20, no part of which has been paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a Washington corporation.

That the alleged bankrupt is indebted to your petitioner, Edward J. Roberts Co., Inc., in the sum of \$2,688.92 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$2,688.92, no part of which has been

paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a California corporation.

That the alleged bankrupt is indebted to your petitioner, Century Floor Coverings, Inc. in the sum of \$8,899.34 as and for goods, wares and merchandise, owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$8,899.34, no part of which has been paid, and the whole thereof is due, owing and unpaid, and that at all times herein mentioned was, has been and now is a California corporation.

V.

Your petitioners allege, that the alleged bankrupt owes debts in excess of the sum of \$1,000 and is insolvent at the present time and at the times mentioned hereinafter, and that the said alleged bankrupt has committed an act of bankrupt in that it made, [3] executed and delivered on March 21, 1949, within four months of the filing of this petition, a general assignment for the benefit of creditors to M. W. Engleman, 1501 West Eighth Street, Los Angeles, California.

Wherefore, your petitioners pray that the service of this petition, together with the subpoena, may be made upon the said alleged bankrupt as provided in the Acts of Congress relating to bankruptcy, and

that it may be adjudged by this Court to be a bankrupt within the purview of this Act.

Dated: April 27, 1949.

MURRAY B. MARSH CO., INC., a
Washington corporation,

/s/ By E. W. NELSON,
Secretary.

EDWARD J. ROBERTS, CO., INC.,
a California corporation,

/s/ By EDWARD J. ROBERTS,
President.

CENTURY FLOOR COVERINGS,
INC., a California corporation,

/s/ By JOSEPH H. WEISMAN,
President.

CRAIG, WELLER & LAUGHARN,

/s/ B. FRANK C. WELLER,
Attorneys for Petitioning Creditors.

Oath to Petition

United States of America,
Southern District of California,
County of Los Angeles—ss.

E. W. Nelson, Secretary of Murray B. Marsh Co.,
Inc. petitioning creditor herein, does hereby make
solemn oath that the statements made in the fore-
going Petition subscribed by him are true.

/s/ E. W. NELSON,
Secretary.

Subscribed and sworn to before me this 27th day
of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

United States of America,
Southern District of California,
County of Los Angeles—ss.

Edward J. Roberts, President of Edward J. Rob-
erts Co., Inc., petitioning creditor herein, does here-
by make solemn oath that the statements made in
the foregoing Petition subscribed by him are true.

/s/ EDWARD J. ROBERTS,
President.

Subscribed and sworn to before me this 27th day
of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

United States of America,
Southern District of California,
County of Los Angeles—ss.

Joseph H. Weisman, President of Century Floor Coverings, Inc., petitioning creditor herein, does hereby make solemn oath that the statements made in the foregoing Petition subscribed by him are true.

/s/ JOSEPH H. WEISMAN,
President.

Subscribed and sworn to before me this 27th day of April, 1949.

[Seal] /s/ M. E. MARSH,
Notary Public in and for said County and State

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 27th day of April, 1949;

Whereas, a petition was filed in this court on the 27th day of April, 1949, against Hacker-Byrnes Corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Hacker-Byrnes Corporation shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,
District Judge.

[Endorsed]: Filed April 27, 1949. [6]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 12th day of May, 1949.

The petition of Murray B. Marsh Co., Inc.; Edward J. Roberts Co., Inc.; and Century Floor Coverings, Inc., filed on the 27th day of April, 1949, that Hacker-Byrnes Corporation be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposing interest:

It is adjudged that the said Hacker-Byrnes Corporation is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed May 12, 1949. [7]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER ON OBJEC-
TIONS TO CLAIMS OF J. J. McDONELL

To the Honorable Paul J. McCormick, Chief Judge
of the Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above entitled matter is pending under an order of general reference, do hereby certify to the following:

J. J. McDonell, a claimant herein, has duly filed his petition for the review of an order made by your Referee in this matter on April 26, 1950, in which, among other things, he decreed that the claims filed by the said J. J. McDonell in this proceeding should be subordinated in payment to the claims of all other general creditors in this case.

The Proceedings

On March 21, 1949, the above named Hacker-Byrnes Corporation made a general assignment for the benefit of its [8] creditors to one M. W. Engleman. On April 27, 1949, a petition in involuntary bankruptcy was filed herein against the said corporation and on May 12, 1949, an order of adjudication was entered upon the said petition. Thereafter, on June 8, 1949, Paul W. Sampsell was appointed as trustee in bankruptcy in this matter.

On May 7, 1949, J. J. McDonell, the petitioner on review, filed two claims in this proceeding, one for

\$600.00 as a prior labor claim, and the other for \$16,064.00 as a general labor claim. On December 14, 1949, the said trustee filed his objections to the said claims and the said objections were duly heard by your Referee on January 11 and January 20, 1950. At the same time, your Referee heard objections filed by the said trustee to claims asserted in this matter by Edmund G. Egan, Everett M. Gregory, Alice C. Harris and Roy B. Smith.

Thereafter, on April 26, 1950, your Referee filed herein his Findings of Fact, Conclusions of Law and Order upon each and all of the aforesaid objections. In his said order your Referee decreed, among other things, that the priority asserted by the said J. J. McDonell in his aforesaid claim for \$600.00 should be denied; that the said claim should be allowed as a general claim; that the aforesaid claim filed by the said J. J. McDonell for \$16,064.00 should be allowed as a general claim; and that both of said claims should be subordinated in payment to the claims of all other general creditors herein. It is from your Referee's said order of subordination that this review is taken.

The aforesaid Edmund G. Egan has also filed a petition for the review of your Referee's aforesaid order of April 26, 1950, and your Referee's certificate on the said petition is being filed simultaneously herewith. No other petitions [9] for review have been filed by any of the aforesaid claimants. However, Glenn G. Savage, another labor claimant in this case, has filed a petition for the review of an

order made by your Referee upon objections filed to his claim and your Referee's certificate upon the said petition is being filed contemporaneously herewith.

The Questions Presented

The questions presented by this review are set forth in detail on pages 1 to 3 of the petition for review which is going up with this certificate but, in the opinion of your Referee, the said questions may be briefly stated as follows:

Should the claims of J. J. McDonell be subordinated in payment to the claims of all other general creditors in this case?

The Evidence

The evidence in this matter will be found in the reporter's transcript and in the exhibits, all of which are going up with this certificate.

Referee's Findings of Fact, Conclusions of Law and Order

The original of your Referee's Findings of Fact, Conclusions of Law and Order in this matter is going up with this certificate.

Papers Submitted

The following papers are herewith transmitted:

1. Photostat of claim of J. J. McDonell for \$600.00, filed May 7, 1949.

2. Photostat of claim of J. J. McDonell for \$16,064.00, filed May 7, 1949.

3. Objections to the claims of J. J. McDonell, filed December 14, 1949.

4. Findings of Fact, Conclusions of Law and Order on Objections to Various Claims, filed April 26, 1950. [10]

5. Petition of J. J. McDonell for Review of Order on Objection to his Claim, filed May 5, 1950.

6. The following exhibits: Claimant's Exhibit A for Identification, filed January 20, 1950. Trustee's Exhibit 1, filed January 20, 1950.

7. Reporter's transcript of hearing on objections to claims, filed June 22, 1950.

Respectfully submitted this 11th day of July, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed July 11, 1950. [11]

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of California,

County of Los Angeles—ss.

J. J. McDonell, of No. 3114 West 78th Street, in Los Angeles, county of Los Angeles, State of California, being duly sworn, deposes and says:

* * *

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to said deponent (or copartnership or corporation), in the sum of Six Hundred dollars (\$600.00).

3. That the consideration of said debt (or liability) is as follows: Wages earned by claimant within three (3) months before the date of the commencement of these proceedings.

4. That no part of said debt (or liability) has been paid, except (allowed as general and subordinated 4-26-50.)

* * *

9. This claim is filed as an Priority Claim.

/s/ J. J. McDONELL,

(Name of individual agent, officer, or partner making oath.)

Subscribed and sworn to before me this 4th day of May, 1949.

/s/ P. P. BENJAMIN,

(Official character)

Power of Attorney:

Said claimant hereby authorizes (11) Paul P. Benjamin of 756 So. Broadway, Room 1425, Los Angeles 14, Calif. or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress delating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

Designation of address to which notices shall be addressed: Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following addresses:

[Endorsed]: Filed May 7, 1949. [12]

Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of California,

County of Los Angeles—ss.

J. J. McDonell of No. 3114 West 78th Street, in Los Angeles, county of Los Angeles, State of California, being duly sworn, deposes and says:

* * *

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to said deponent (or copartnership or corporation), in the sum of Sixteen Thousand and Sixty-Four Dollars (\$16,064.00).

3. That the consideration of said debt (or liability) is as follows: Wages earned, due and owing.

4. That no part of said debt (or liability) has been paid except (Allowed as general and subordinated -26-50.)

* * *

9. This claim is filed as an Unsecured Claim.

/s/ J. J. McDONELL,

Name of individual, agent, officer, or partner making oath)

Subscribed and sworn to before me this 4th day of May, 1949.

/s/ P. P. BENJAMIN

(Official character)

Power of Attorney:

Said claimant hereby authorizes (11) Paul P. Benjamin of 756 So. Broadway, Room 1425, Los Angeles 14, California, or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress delating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

Designation of address to which notices shall be addressed: Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following addresses:

[Endorsed]: Filed May 7, 1949. [13]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIMS AND NOTICE OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

J. J. McDonell (Nos. 7 and 8)	\$ 600.00
c/o Paul P. Benjamin	16,064.00
425 Chapman Building	
Los Angeles, California	

Your trustee alleges that claim No. 7 filed in the amount of \$600.00 as a prior labor claim under the provisions of Sec. 64a-2 is not entitled to a priority under the said Section on the grounds that the said claimant was General Manager and Sales Manager of the bankrupt corporation, and was not the servant or clerk thereof; that he directed the activities of the corporation and had under his supervision a large number of employees.

The claimant has filed as claim No. 8 a general claim in the amount of \$16,064.00. Your trustee alleges that no such sum is now due or owing to the said claimant and that therefore this claim should not be allowed even as a general claim, but should be rejected and disallowed in full. Insofar as the aforesaid claim for \$600.00 is denied priority, your trustee alleges that no portion of that sum is due

or owing as a general claim and that it should be disallowed.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ PAUL W. SAMPSELL
Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy, in the Federal Building, Los Angeles, California, on the 11th day of January, 1950, at the hour of 2:00 o'clock p.m.

Dated: December 13, 1949.

CRAIG, WELLER & LAUGHARN,

/s/ By C. E. H. McDONELL,

Attorneys for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 14, 1949. [14]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON OBJECTIONS TO
VARIOUS CLAIMS

Mr. J. J. McDonell having filed his claims herein in the sum of \$16,064.00 and in the sum of \$600.00, which latter claim is contended to be entitled to prior payment as a wage claim under 64(a)2 of the Bankruptcy Act; and Edmund G. Egan having filed his claim herein in the sum of \$4,269.27; and Everett M. Gregory having filed his claim in the amount of \$6,169.96; and Alice C. Harris having filed her claim in the sum of \$725.00 herein; and Roy B. Smith having filed his claim in the sum of \$1,400.00 herein, and the trustee having objected to the allowance of all the foregoing claims on any basis whatsoever and the said objection having regularly come on for hearing before the undersigned Referee in bankruptcy on January 11, 1950, at the hour of 2:00 p.m. and having been continued to the 20th day of January 1950, at the hour of 2:00 p.m. for the purpose of taking additional evidence, the said trustee having appeared and being represented by his attorneys Craig, Weller & Laugharn by C. E. H. McDonell, and the claimant J. J. McDonell having appeared in person and represented by his attorneys Benjamin & Kronick by Robert I. Kronick, and the claimant Edmund G. Egan having appeared in per-

son and represented by his attorney James A. Gilbert, and the claimants Everett M. Gregory, [16] Alice C. Harris and Roy B. Smith having appeared pro-per; evidence both oral and documentary having been submitted and the Referee being fully advised in the premises the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That the claimant J. J. McDonell entered the employment of the bankrupt corporation September 15, 1947, and was paid at that time a salary of \$150.00 per week; that prior to the commencing of the employment of the said claimant J. J. McDonell, representations were made to the claimant J. J. McDonell that his salary would be the sum of \$15,000.00 per year, plus 50% of the net profits of the carpet department of the bankrupt corporation, the difference between his total weekly stipend and the said \$15,000.00 to be paid at the end of one year; that in the month of November 1947 while the claimant J. J. McDonell was an officer and director of the bankrupt corporation at a Board of Directors meeting at which the said claimant was present, representations and statements were made by Mr. Al Hacker, who was at that time President and sole stockholder in the bankrupt corporation, that the

claimant J. J. McDonell was to receive, beginning January 1, 1948, a "guaranteed salary" of \$20,000.00 per year and that this "guaranteed salary" was to be paid at the rate of \$150.00 per week during the year beginning January 1, 1948, and the difference between the total of such weekly payments and the "guaranteed salary" of \$20,000.00 was to be payable at the end of the year; that at the aforesaid directors meeting statements and representations were also made by the said Al Hacker, that in addition to the foregoing "guaranteed salary" the claimant J. J. McDonell was to receive at the end of a year 15% of whatever profits were left over after the payment of any and all expenses of the bankrupt corporation, including the various "guaranteed salaries" then [17] under discussion; that the difference between the total weekly payments at a rate of \$150.00 per week and \$15,000.00 for the pro-rata portion of the year 1947 for which the claimant worked is the sum of \$2,215.00; that the difference between the weekly amounts received and the \$20,000.00 "guaranteed salary" in the year 1948, is the sum of \$13,000.00; that in the year 1949 the claimant J. J. McDonell was in the employ of the bankrupt corporation from January 1st to February 18th being paid a sum of \$150.00 per week; that the difference between the total weekly payments at the rate of \$150.00 per week and \$20,000.00 for the pro-rata portion of the year 1949 total which the claimant was employed by the bankrupt corporation, is the sum of \$1,449.00; that no representations or statements were made at the heretofore mentioned Board

of Directors meeting in the month of November 1947, at which time "guaranteed salary" of the chairman J. J. McDonald was discussed, or at any other time, or at all, by Mr. A. Hacker or any other agent, representative or officer of the bankrupt corporation as to the duration of the period for which the chairman J. J. McDonald was to receive "guaranteed salary" of \$240,000 per year; that the time of payment of the balance between the total of the weekly amounts of \$15,000 per week and the "guaranteed salary" of \$240,000 per year was never fixed by any agreement between the chairman J. J. McDonald and the bankrupt corporation; that the chairman J. J. McDonald was not at any time a stockholder in the bankrupt corporation.

II.

That at a Board of Directors meeting in the month of November 1947, while the chairman Edmund G. Egan was an officer and director of the bankrupt corporation, and at which meeting the said Edmund G. Egan was present and participated, representations and statements were made to the chairman Edmund G. Egan by Mr. A. Hacker, who was at that time President and sole stockholder of the bankrupt [18] corporation, that Egan's "guaranteed salary" would be the sum of \$240,000 per year retroactive to November 3, 1947, and that his weekly spend would be the sum of \$15,000, also retroactive to November 3, 1947; that the difference between the total of such weekly payments and the "guaranteed salary" of \$240,000 per year was represented as being payable at the end of the year, which sum is

found to be the amount of \$3,113.27; that the claimant Edmund G. Egan left the employ of the bankrupt corporation October 20, 1945; that at the aforesaid directors meeting statements and representations were also made by the said Al Hacker, that in addition to the foregoing "guaranteed salary" the claimant Edmund G. Egan was to receive at the end of a year 11.66% of whatever profits were left over after the payment of any and all expenses of the bankrupt corporation, including the various "guaranteed salaries" then under discussion; that no representations or statements were made at the heretofore mentioned Board of Directors meeting in the month of November 1947, at which time "guaranteed salary" of the claimant Edmund G. Egan was discussed, or at any other time, or at all, by Mr. Al Hacker or any other agent, representative or officer of the bankrupt corporation as to the duration of the period for which the claimant Edmund G. Egan was to receive "guaranteed salary" of \$12,000.00 per year; that the time of payment of the balance between the total of the weekly amount of \$150.00 per week and the "guaranteed salary" of \$12,000.00 per year was never fixed by an agreement between the claimant Edmund G. Egan and the bankrupt corporation; that the claimant Edmund G. Egan was not at any time a stockholder of the bankrupt corporation.

That at a Board of Directors Meeting in the month of November 1947, while the claimants J. J. McNeill and Edmund G. Egan were officers and directors of the bankrupt corporation and while one Leon G. Savage was an officer of the bankrupt cor-

poration, in which meeting the said claimants Egan and McDonell participated, [19] and at which the said Glenn G. Savage was present, it was agreed that the following "guaranteed salaries" would thereafter be paid: Al Hacker \$50,000.00 a year plus 50% of the net profits; J. J. McDonell \$20,000.00 a year plus 15% of the net profits; Edmund G. Egan \$12,000.00 a year plus 11.66% of the net profits; Glenn G. Savage \$12,000.00 per year plus 11.66% of the net profits; Robert W. Schuler \$12,000.00 per year plus 11.66% of the net profits.

III.

That the claimant J. J. McDonell was at all times during his employment by the bankrupt; in charge of the carpet department at the "Wilshire Store" and had under his supervision and direction at all times a number of employees, and that from and after November of 1947 he was the General Manager of the bankrupt corporation; that the claimant Edmund G. Egan was at all times during his employment by the bankrupt in charge of its contract sales.

IV.

That except as shall hereinafter be set forth in more detail, the claimant J. J. McDonell received the sum of \$150.00 per week from January 1, 1948 until February 18, 1949 and the claimant Edmund G. Egan received the sum of \$150.00 per week from and after November 5, 1947 until May 12, 1948 from and after which time Egan received the sum of \$100.00 per week.

V.

That on or about May 12, 1948, certain reductions were made in the weekly amounts paid to various employees of the bankrupt corporation, as follows:

	Amount prior to 5-12-48	Amount from and after 5-12-48
Edmund G. Egan.....	\$150.00 Wk.	\$100.00 Wk.
J. J. McDonell.....	150.00 “	100.00 “
Alice C. Harris.....	125.00 “	100.00 “
Everett M. Gregory.....	125.00 “	100.00 “
Roy B. Smith.....	150.00 “	100.00 “

That the hereinabove set forth reductions in weekly payments were at all times maintained from and after May 12, 1948 while the aforesaid employees were in the employ of the bankrupt corporation; that as set forth hereinabove, amounts paid by the bankrupt corporation to the claimant J. J. McDonell from and after May 12, 1948, was the sum of \$100.00 per week, but at all times from and after May 12, 1948, the President of the bankrupt corporation, Al Hacker, paid from his own funds and in his own individual capacity to the claimant J. J. McDonell an amount of \$50.00 per week so as to effectively restore to the claimant J. J. McDonell the ostensible reduction in his weekly payment from and after May 12, 1948.

VI.

That no promises, representations or statements of any kind or nature whatsoever were made to any of the employees of the bankrupt corporation, that the losses experienced by the reductions in weekly payments on or about May 12, 1948, would be restored.

VII.

That there were no representations, promises or statements of any kind whatsoever by any member, agent or officer of the bankrupt corporation to any of the employees of the said bankrupt corporation that any bonuses would be paid to them at Christmas time or any other time in return for faithful service.

VIII.

That there were no representations or promises at any time by any member of the bankrupt corporation or any agent thereof to any employee of the said bankrupt corporation that any of the employees would be entitled as a matter of right, to any vacation or any pay in lieu of said vacation.

IX.

That there were no promises, representations or statements of any kind or nature whatsoever at any time by any member [21] of the bankrupt corporation or any agent or officer thereof to Everett M. Gregory that the said Everett M. Gregory would receive a "guaranteed salary" of \$12,000.00 per year.

X.

That throughout the year 1948 the bankrupt corporation was experiencing financial difficulties due to shortage of liquid capital; that the bankrupt corporation made a general assignment for the benefit of creditors on the 21st day of March 1949; that an Involuntary Petition in Bankruptcy was filed on the 27th day of April 1949; that the schedules filed by the bankrupt corporation herein show total liabilities in the amount of \$156,943.91 as against total assets

in the amount of \$55,389.08; that there were in existence at the time of the filing of the aforesaid petition in bankruptcy, creditors whose claims arose and became due and owing prior to November 1947; that there will be insufficient assets in this bankrupt estate to pay all general unsecured creditors in full.

Conclusions of Law

I.

That there is an enforceable contract between the claimant J. J. McDonell and the bankrupt corporation whereby the claimant J. J. McDonell from and after September 15, 1947 was to receive a minimum payment of \$150.00 per week with the maximum compensation of \$15,000.00 per year, plus the balance between the \$150.00 per week minimum and the \$15,000.00 maximum to be payable at the end of a year; that the said enforceable contract also provided that the claimant J. J. McDonell was to receive 50% of the net profits of the carpet department; the said contract was terminated by mutual agreement through the substitution of another employment contract as set forth hereinafter.

II.

That there was an enforceable contract between the claimant J. J. McDonell and the bankrupt corporation whereby from and after [22] January 1, 1948, the said claimant J. J. McDonell was to receive a "guaranteed salary" of \$20,000.00 per year, payable without regard as to whether a profit was made by the bankrupt corporation and that by the

terms of the said contract, claimant J. J. McDonell in addition to the foregoing “guaranteed salary”, was entitled to receive 15% of any net profits of the corporation.

III.

That there was a contract between the claimant Edmund G. Egan and the bankrupt corporation whereby from and after November 5, 1947, the said claimant Edmund G. Egan was to receive a “guaranteed salary” of \$12,000.00 per year, payable without regard as to whether a profit was made by the bankrupt corporation and that by the terms of the said contract, claimant Edmund G. Egan in addition to the aforementioned “guaranteed salary” was entitled to receive 11.66% of any net profits of the corporation.

IV.

That each and all of the aforesaid enforceable contracts were not fair, equitable or just and are not fair, equitable or just, as against the creditors of the bankrupt corporation, for these reasons, among others, to-wit: (1) that from and after November of 1947, the claimants, McDonell and Egan, were officers and directors of the bankrupt corporation and, as such, were charged with the responsibility of providing for the payment of all of the just obligations of the bankrupt corporation, which was not done for it appears that at the date of the termination of its business the corporation was heavily indebted to its creditors and its liabilities were substantially in excess of its assets; (2) that the “guaranteed salaries” aforesaid were excessive and unreasonable in the light of the ability of the bank-

rupt corporations to pay the same and, at the same time, to discharge the obligations which it incurred while the said salaries were being earned; (3) that the rights given to the said claimants [23] to participate in the profits, if any, of the bankrupt corporation and the postponement of the time of payment of a substantial portion of their respective "guaranteed salaries" to the rather indefinite time of the expiration of one year, gave the said claimants an unfair and inequitable advantage over the creditors of the bankrupt corporation in that, if the corporation prospered during the period of the aforesaid postponement, the claimants would collect their said salaries in full and, at the same time, would be entitled to their respective shares of the profits earned in such period; whereas, if, in such period, the corporation did not prosper and no profits were earned, the claimants would still be entitled to claim the unpaid portions of their respective salaries on a parity with all other creditors of the corporation, including the creditors to whom the corporation became indebted during the period of such postponement; and, furthermore, the said postponement of the time of payment of a portion of said "guaranteed salaries" resulted in the accumulation of liabilities by the corporation for the payment of such salaries during a period when it was unable to actually pay the same and thus the said postponement was a factor in keeping the corporation in business and in the incurring by it of further liabilities to creditors which it was eventually unable to pay; whereas, if the said "guaranteed salaries" had all

been payable in normal installments, the corporation, if it had been unable to pay the same when due, might have been compelled to discontinue its operations and might thus have avoided incurring the said further liabilities which eventually it was unable to pay; (4) that when one considers the substantial amounts of the aforesaid "guaranteed salaries" and the substantial percentages of the profits of the bankrupt corporation to which the said claimants were entitled, one is impressed with the idea that the relationship of each of the said claimants was more of the character of the relationship of a partner or a joint adventurer, rather than that of a profit sharing [24] employee and, hence, that the said claimants, in equity, are not entitled to any greater rights, as against the creditors of the corporation, than partners or joint adventurers would have, even though the said claimants may have none of the liabilities to such creditors such as partners or joint adventurers might have.

V.

That the claimant J. J. McDonell was not a workman, servant, clerk or salesman within the meaning as applied by the Courts to those terms as they appear in Section 64(a)2 of the National Bankruptcy Act, but that the said claimant J. J. McDonell was at all times in a supervisory and managerial capacity and his wages do not fall within the scope of Section 64(a)2 of the Bankruptcy Act.

VI.

That there was no enforceable contract made or entered into between the bankrupt corporation and

ts employees to restore to them reductions made in their weekly payments and weekly salaries in the month of May 1948.

VII.

That there was no contract between the bankrupt corporation and any of its employees guaranteeing yearly vacation and payment of wages in lieu hereof.

VIII.

That there was no contract between the bankrupt corporation and any of its employees to pay any guaranteed bonuses at Christmas or any other time.

IX.

That there was no contract between the bankrupt corporation and the claimant Everett M. Gregory, to pay any guarantee over and above the weekly salary of \$100.00 per week paid to the said claimant Everett M. Gregory.

Based upon the preceding Findings of Fact and Conclusions [25] of Law, it is hereby

Ordered that the claim of J. J. McDonell in the amount of \$600.00 filed in the within proceedings for which priority is claimed under Section 64(a)2 of the Bankruptcy Act, be and it hereby is denied priority and is allowed as a general claim, and

It Is Further Ordered that the claim of J. J. McDonell on file herein in the sum of \$16,064.00 be and the same hereby is allowed as a general claim herein; and the said \$16,064.00 and the claim filed in the

amount of \$600.00 as aforesaid be and the same are subordinated in payment to the claims of all other general creditors, the said claims to receive no payment or dividend whatsoever until other allowed general claims have been paid in full; and

It Is Further Ordered that the claim of Edmund G. Egan on file herein in the sum of \$4,269.27 be and the same hereby is allowed in the sum of \$3,119.27 as a general claim in the within proceedings; and the said claim in the amount of \$3,119.27 as aforesaid be and the same is subordinated in payment to the claims of all other general creditors, the said claims to receive no payment or dividend whatsoever until other allowed general claims have been paid in full; and

It Is Further Ordered that the claim of Everett M. Gregory in the sum of \$6,169.86 be and the same hereby is reduced to the sum of \$100.00 and allowed in the said amount as a general unsecured claim, and

It Is Further Ordered that the claims of Alice C. Harris in the sum of \$725.00 and Roy B. Smith on file in the sum of \$1,400.00 be and the same hereby are disallowed.

Dated: April 26, 1950.

/s/ BENNO BRINK,

Referee in Bankruptcy. [26]

[Endorsed]: Filed April 26, 1950.

[Title of District Court and Cause.]

PETITION OF J. J. McDONELL FOR REVIEW
OF ORDER ON OBJECTION TO HIS
CLAIM

The Petitioner, J. J. McDonell filed two wage claims against the above entitled bankrupt, one in the sum of \$16,064.00 as a General Claim and one for \$600.00 as a preferred wage claim under Section 64(a)2 of the Bankruptcy Act. The Trustee in bankruptcy filed objections to both claims and asked that the same be disallowed. After a contested hearing hereon, the Referee in bankruptcy disallowed the claim of priority but allowed both claims as General Claims against the above bankrupt. However, under his Order dated April 26, 1950, the Referee subordinated the payment of said claims to all other general creditors. This Petition for Review is only directed against the aforesaid portion of said order relating to said subordination.

That said Order of April 26, 1950 was and is erroneous with respect to the subordination of said claim, for the following reasons:

(1) The subordination of Petitioner's claim is based upon the fact that he was an officer and director of the corporation when the contract for his salary was made and that said [27] contract was not fair, equitable or just as against the creditors of the bankrupt corporation. In this connection, the Findings of Fact are not substantiated by the testimony taken upon the hearing, which in brief was as follows: The sole stockholder at the time the contract

was made with the Petitioner was Mr. Al Hacker, That the Petitioner, J. J. McDonell was not a stockholder of the bankrupt corporation, nor did he then or at any time have any financial interest therein, but came there purely as an employee in charge of the carpet department at a salary of \$15,000.00 per year plus 50% of the net profits of the carpet department. That prior to his employment by the bankrupt corporation, he earned approximately said amount annually as an employee of Walton N. Moore Dry Goods Co. Inc. That he had approximately twenty-five years experience in the carpet and floor coverings business. That he was made a director and officer by Hacker approximately two months after his employment by the bankrupt corporation at a time when said Hacker had just purchased the stock of one Byrnes and had become the holder of all of the outstanding stock of said corporation. That said Al Hacker made the Petitioner an officer and director of said corporation as a matter of convenience only because he had to have three directors for his corporation. He also made him General Manager of the corporation at an increased minimum salary of \$20,000.00 per year.

Petitioner contends that he was only a "dummy" director and officer and considered himself just a salaried employee and as soon as certain persons came into the corporation with new financing, he was immediately removed as an officer and director. He was not an officer or director at the time of the assignment for the benefit of creditors or the adjudication in bankruptcy.

(2) That there is no testimony that at the time the contract was entered into with the Petitioner, J. J. McDonell, [28] that the bankrupt corporation was insolvent.

(3) That the bankrupt corporation handled some of the largest floor covering jobs in Los Angeles, among them the complete installation of floor coverings in the new General Petroleum Building at Sixth and Flower Streets, Los Angeles and other transactions which involved large sums of money. That the amounts agreed to in the contracts of employment entered into by the Petitioner with the bankrupt corporation, are reasonable for the services rendered, based on the experience of said Petitioner.

(4) That no action or conduct on the part of the Petitioner caused said corporation to become insolvent. A reference to the file in the above numbered bankruptcy, will show that same was caused by purported withdrawal of assets by the principal stockholders and new officers of the corporation and that the Referee has made an order instructing the Trustee to file suits against them to recover amounts alleged to be in excess of \$100,000.00.

(5) The testimony also shows that up to the time that other persons came into the business, that the bankrupt corporation was a one man affair, dominated by the said Al Hacker, its sole stockholder and President.

(6) That the claim of this Petitioner was filed in good faith and that there was no fraud or unfairness whatsoever involved in his dealings with the corporation. The mere fact that he happened to

be an officer or director who thereafter files a claim against the corporation, will not prevent an allowance of his claim on a parity with the other creditors, where no fraud or unfairness is involved. There must be a showing that the allowance of this claim would be an unjust and unfair enrichment of the Petitioner before a court of equity can cause his claim to be subordinated to other creditors. In re: [29] *Kansas City Journal Post*, 144 Fed. (2d) 791. No such showing was made, but on the contrary, it was proved that his actual earnings prior to his employment with the bankrupt corporation were approximately at the same rate as that which he claims from the bankrupt corporation.

Subordination is usually ordered in the case of one man corporations where the controlling stockholder makes claims for money loaned to the corporation or for salary for services rendered to it. *Pepper vs. Litton*, *American Bankruptcy Reports*, N.S. Vol. 4, 290.

Wherefore, Petitioner prays that said order of April 26, 1950 be reversed insofar as it subordinates Petitioner's claim to all other general creditors and that said Referee be directed to enter forthwith, an order allowing Petitioner's claim as a general claim, without subordination, and for general relief.

Dated: May 5, 1950.

BENJAMIN & KRONICK

/s/ By ROBT. I. KRONICK,

Attorneys for Petitioner,

J. J. McDonell.

Note

Petitioner requests the following documents to be transmitted to the Judge upon this review:

(1) Objections of Trustee to approval of Petitioner's claims.

(2) Certified copy of Findings of Fact, Conclusions of Law and Order Approving Petitioner's claims, but subordinating payment of same to other general creditors, dated April 26, 1950.

(3) Reporter's Transcript of proceedings before Referee on January 11th and January 20th, 1950, including only testimony [30] of witnesses Hacker, McDonell, Egan, Major, Alice C. Harris and attorney Leo Gold.

(4) This Petition for Review.

(5) Referee's Certificate on Review.

(Duly certified.)

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1950. [32]

In the District Court of the United States
for the Southern District of California,
Central Division

In Bankruptcy No. 47,485-M

In the Matter of

HACKER-BYRNES CORPORATION,
Bankrupt.

ORDER CONFIRMING REFEREE'S ORDERS
ON OBJECTIONS TO CLAIMS OF J. J.
McDONELL, EDMUND G. EGAN AND
GLENN G. SAVAGE

Upon consideration and study of the entire record, including transcripts of proceedings and evidence before the Referee in Bankruptcy on January 11th and 20th, 1950, and on February 24, 1950, the Court cannot say that the Referee erroneously subordinated the claims of J. J. McDonell or Edmund G. Egan or Glenn G. Savage. Accordingly, the orders of the Referee dated April 26, 1950, subordinating the claims of the aforesaid three claimants are and each is confirmed.

General Orders in Bankruptcy 36, 47;
Federal Rules of Civil Procedure, Rule 52, 28
U.S.C.A.;

Pepper v. Litton, 308 U.S. 295;

Prudence Corp. v. Geist, 316 U.S. 89.

In amplification of the foregoing confirmatory rulings, we think the record before us shows that

he Referee in Bankruptcy was confronted with the necessity of choosing between creditors solely in the unsecured category of claimants. Cf. *In re Kansas City Journal-Post Co.*, 144 F.2d 791. And after extended hearings herein, oral [38] and documentary evidence was elicited from which, after argument by the attorneys for the respective parties, the Referee made comprehensive findings of fact as to the comparable status of claimants and the other unsecured creditors of the bankrupt estate and concluded that because of the disparity which would result if the trustee's attack upon the salary claims be wholly nullified he subordinated such claims here under review to those of the other unsecured creditors upon equitable principles. We think he pursued the line of established law in so doing and that his orders under review should not be disturbed.

Dated February 21, 1951.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed February 21, 1951. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY J. J. McDONELL,
CLAIMANT

Notice Is Hereby Given that J. J. McDonell, the above named claimant, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order Confirming the Referee's Order on Objections to the claims of said J. J. McDonell and others, entered in this matter on the 21st day of February, 1951, insofar as said order affects the rights of or applies to said claimant.

Dated: March 20th, 1951.

BENJAMIN & KRONICK

/s/ By ROBT. I. KRONICK,

Attorneys for J. J. McDonell,
Claimant.

Service by mail attached.

[Endorsed]: Filed March 21, 1951. [40]

[Title of District Court and Cause.]

COST BOND ON APPEAL
Continental Casualty Company

Bond No. 1,508,284

Premium: \$10.00

Whereas J. J. McDonnell and only J. J. McDonnell has appealed to the U. S. Circuit of Appeals, Ninth Circuit, from an order confirming referee's order on objections to claim of him and others on February 21st, 1951, by Paul J. McCormick, Judge

in the United States District Court, Southern District of California, Central Division,

Now, Therefore, in consideration of the premises and of such appeal, the Continental Casualty Company, incorporated under the laws of the State of Illinois and authorized to execute bonds and undertakings as sole Surety, does hereby undertake and promise on the part of the said Appellant, that the said Appellant will pay all costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself bound.

Signed, sealed and dated this 20th day of March, 1951.

[Seal]

CONTINENTAL CASUALTY
COMPANY

/s/ STUART S. ROUGH,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 20th day of March, 1951, before me, O. S. Demeter, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared Stuart S. Rough, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-Fact of the Continental Casualty Company, and acknowledged to me that he subscribed the name of

the Continental Casualty Company thereto and his own name as Attorney-in-Fact.

[Seal] *s/* O. S. DEMETER,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 3, 1954.

[Endorsed]: Filed March 21, 1951. [41]

[Title of District Court and Cause.]

APPELLANT J. J. McDONELL'S DESIGNA-
TION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

J. J. McDonell, appellant above named, hereby designates the following portions of the record to be contained in the record on appeal in the above entitled matter:

(1) Involuntary Bankruptcy Petition against Hacker-Byrnes Corporation.

(2) Petition for Order referring proceedings to a referee.

(3) Order of General Reference.

(4) Order of Adjudication.

(5) Two claims of J. J. McDonell.

(6) Objections of Trustee in Bankruptcy to claims of J. J. McDonell.

(7) A transcript of the evidence taken before Honorable Benno M. Brink, Referee in Bankruptcy on January 11, 1950 and January 20, 1950, being that portion of the reporter's transcript of hearings on objection to claims, prepared by H. A. Singeltary,

commencing at Line 12, Page 34 with the testimony of J. J. McDonell, [42] to and including Line 16, Page 136 and commencing at Line 1, Page 140 to and including Line 26, Page 165.

(8) Findings of Fact and Conclusions of Law and Order on objection to claims, signed by Referee Brink.

(9) Petition of J. J. McDonell for Review of Order on Objection to his Claim.

(10) Referee's Certificate on Petition for Review of Order on Objections to Claim of J. J. McDonell.

(11) Order Confirming Referee's orders on objection to claims of J. J. McDonell and others, dated February 21, 1951.

(12) Notice of Appeal.

(13) This Designation of Record on Appeal.

Dated: April 3rd, 1951.

BENJAMIN & KRONICK

/s/ By ROBT I. KRONICK,

Attorneys for claimant and Appellant, J. J. McDonell.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 3, 1951. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 44, inclusive, contain the original Creditors' Involuntary Petition; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Petition for Review of Order on Objections to Claims of J. J. McDonell; Copies of Two Proofs of Claim in Bankruptcy; Objections to Claims and Notice of Hearing of Objections; Findings of Fact, Conclusions of Law and Order on Objections to Various Claims; Petition of J. J. McDonell for Review of Order on Objection to His Claim; Claimant's Exhibit A for Identification; Trustee's Exhibit 1; Order Confirming Referee's Orders on Objections to Claims of J. J. McDonell, Edmund G. Egan and Glenn G. Savage; Notice of Appeal by J. J. McDonell, Claimant; Cost Bond on Appeal and Designation of Record on Appeal which, together with Reporter's Transcript of Proceedings on Hearing on Objections to Claims on January 11 and 20, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20th day of April, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

/s/ By P. D. HOOSER,
Deputy Clerk.

In the District Court of the United States
for the Southern District of California
Central Division

No. 47,485-M

In the Matter of

HACKER-BYRNES CORPORATION,

Bankrupt.

Before the Honorable Benno M. Brink, Referee
in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING
ON OBJECTIONS TO CLAIMS

Appearances:

For the Trustee: Craig, Weller & Laugharn by
C. E. H. McDonnell, Esq.

For Claimant J. J. McDonnell: Robert I. Kronick,
Esq.

For Claimant Edmund G. Egan: James A. Gil-
bert, Esq. [1*]

Los Angeles, California

Wednesday, January 11, 1950

* * *

J. J. McDONELL

Called as a witness, being first duly sworn, testified as
follows:

The Referee : Your name is J. J. McDonell?

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

(Testimony of J. J. McDonell.)

The Witness: That is right.

The Referee: Now, let's see what you have here, Mr. McDonell. You have two claims, have you?

Mr. Kronick: If the Court please, may I make a short statement here which may shorten the matter?

The Referee: All right.

Mr. Kronick: In connection with Mr. McDonell's claim and Mr. Egan's claim, we have several witnesses here and they are both in the same position and we are willing to stipulate that the testimony of these witnesses, with the exception of course of the amounts that are owing to each [34] individual, may be taken on account of each claim.

The Referee: So stipulated, Mr. McDonnell?

Mr. McDonnell: I will so stipulate, your Honor.

The Referee: All right, let me find out first what Mr. McDonnell claims here.

Well, gentlemen, you ought not to file claims in bankruptcy like this. This claim is \$16,064.00, wages earned, due and owing. Is that all the claim says?

Mr. Kronick: That is all.

The Referee: And what is the next one——

Mr. Kronick: He alleges a preferred claim of \$600.00.

The Referee: Wages earned within 3 months before the date of the commencement of these proceedings.

Well, gentlemen, when you file a claim in bankruptcy, please be good enough to give the Court and the Trustee some information about the transaction. After all now, \$16,000.00 is still a sizeable sum of

(Testimony of J. J. McDonell.)

money. You know you would be demurred out of court over in the Supreme Court on a thing like this in 10 minutes.

Mr. Kronick: In defense of myself, I didn't prepare this.

The Referee: I don't care who prepared it. After all, I'm not going to go ahead on the trial of a thing here unless I have something in front of me. Do you know anything about this, Mr. McDonnell, what the details are on these two Claims? [35]

Mr. McDonnell: It was necessary to make some investigation. We do have some rough idea of the details and the manner in which the claim is supposed to have arisen.

The Referee: Well, let me see what Mr. Egan has got here.

Mr. Gilbert: Please the Court, we are in much the same position. However, in defense of our position I must say that in answer to inquiry from the Trustee an itemized statement of the claim was——although not filed with the Court——was given to the Trustee for his information, relating to specific dates, periods, and specific amounts claimed; and I gave that personally to Mr. Harpole of your office, Mr. McDonnell.

Mr. McDonnell: That is right.

Mr. Gilbert: And I ask leave of the Court to amend our proof of claim if that is necessary at this time.

The Referee: Oh, there is no question about it. I'm not going to allow a claim in the shape in which

(Testimony of J. J. McDonell.)

these claims are. You are going to have to give us further information about them.

Well, now, what information, Mr. McDonnell, do you have on Mr. McDonell?

Mr. Kronick: I think in defense of myself also, your Honor, I might say an associate in my office has discussed this at great length with Mr. McDonnell and with the Trustee.

The Referee: Have you anything in writing from these [36] people, Mr. McDonnell?

Mr. McDonnell: I believe letters have been written to the Trustee.

The Referee: Well, let's see what you got. We have got to save time.

Mr. McDonnell: Your Honor, I have notes made off the letters but I don't have the original letters here. I don't have that file.

The Referee: All right. Going back to the claim of Mr. McDonell, I understand that the two claims are one except that a portion of the amount is set forth in the separate claim for the purpose of expressing a claim of priority; is that right?

Mr. Kronick: Correct, your Honor.

The Referee: All right, I will hear from you. You tell me what this is all about.

Mr. Kronick: Very well. I think I can shorten it.

Q. Mr. McDonell, when did you—

The Referee: No, I want you to make a statement here of what this is before we go ahead.

Mr. Kronick: Very well, your Honor. Mr. McDonell had been engaged in the business, in the rug busi-

(Testimony of J. J. McDonell.)

ness, for many years, and was employed with a large firm here before he went over to Hacker-Byrnes. At that time he was earning approximately \$15,000.00 a year. He was employed in the latter part of 1947 by Hacker-Byrnes as the manager and salesmanager and [37] in complete charge of their rug department. At that time he was given, under an oral agreement with Mr. Hacker, a guarantee of a salary of \$15,000.00 a year, plus 50 per cent of the profit derived from the rug department only.

That continued until Mr. Hacker bought out Mr. Byrnes and became the complete owner of the business. At that time he called together several executives and made some of them or several of his executive employees, not only made them directors of the company but gave them offices of vice-president, etc., and the new agreement was that Mr. McDonell was to receive a guarantee of \$20,000.00 a year plus a share of the gross profits.

We are not making any claim for that. Each of the executive officers were given a definite percentage, but there was no profit and we are standing on the salary. Against that he was paid \$150.00 a week. He was employed to the 18th day of February, 1949; and that is my reason for filing the preferred claim for \$600.00, which is the limit. We figured it was about three weeks within the three-months period.

The Referee: But he did get his \$150.00 a week up to February 18, 1949?

Mr. Kronick: Yes. Sometimes he didn't get it all.

The Referee: Well, you are going to have the

(Testimony of J. J. McDonell.)

laboring oar there, sir, trying to get any priority for anything over [38] \$150.00 a week. The priority statute is for those who are dependent upon their wages for their livelihood.

Mr. Kronick: This man is.

The Referee: \$150.00 a week ought to take care of a man in pretty good shape. Anything over and above that I think is just something in excess.

However, I will leave that aside for the moment. I am just pointing out your difficulty here.

Mr. Kronick: I have checked some of the authorities. That statute is very liberally construed. It is up to the Court.

The Referee: I have a whole stack of creditors here whose claims are just, too. So let's get down to some realities.

Mr. Kronick: Well, this claim is the difference between what he was paid and the guarantee.

The Referee: All right, go ahead and prove your claim. I will take a recess first. It may take you some time.

(Recess)

The Referee: All right, let's go forward with the McDonell claim.

Direct Examination

By Mr. Kronick:

Q. Mr. McDonell, when did you become employed by Hacker-Byrnes Corporation?

A. The first week in September of 1947. [39]

(Testimony of J. J. McDonell.)

Q. And what was the financial basis of your employment?

A. A guarantee of \$15,000.00 a year and a share of the profits, 50 per cent of the profits of the rug department. That \$15,000.00 was a guaranteed amount and any profits that I would derive would have to be above the \$15,000.00, on a split.

Q. In other words, the \$15,000.00 would be taken off of the profits of the rug department before you would share in 50 per cent of the profits?

The Referee: That isn't what he said.

The Witness: It was a guaranteed amount of \$15,000.00 regardless of whether there was any profit or not.

The Referee: But supposing the profits were \$30,000.00 in the rug department, how much would you get?

The Witness: Then I would get \$15,000.00.

The Referee: I see. All right. So he was to have 50 per cent of the profits of the rug department, with a guarantee that the 50 per cent of the profits would not be less than \$15,000.00?

Mr. Kronick: No, that is not what he said.

The Referee: That is what he said. That is what the man said.

Q. By Mr. Kronick: Who did you have a conversation with when you became employed there?

A. Mr. Hacker.

Q. What was that conversation? [40]

A. He gave me a guarantee of \$15,000.00. When I went there Mr. Hacker didn't have very much of a

(Testimony of J. J. McDonell.)

rug department. He asked me for a year or two prior to that to come and work for him; and at the time I went to work for him he didn't have any of the major carpet lines, and I felt, and I told him so at the time, that it wasn't going to be a deal where we could build up a business overnight, it was going to take a little time to build it; and he told me at that time he didn't expect to make any money for maybe a year or two, that he was willing to give me a guarantee of \$15,000.00 a year and a share of the profits of 50 per cent. Whatever the \$15,000.00 was, that was a guaranteed amount, whether we made any money in the rug department or not, and I didn't expect to make any the first year.

Q. In other words, the rug department was starting from scratch?

A. He had a small rug department.

Q. Where were you employed at that time?

A. Walton N. Moore Rug Company.

Q. About how long have you been in the rug business? About how long have you been engaged in the rug business?

A. 25 years. I was 11 years with Walton N. Moore Rug Company.

Q. And have you got your income tax return to show what you earned at Walton N. Moore's for the half year before you went to Hacker-Byrnes? [41]

A. I have the return for 1946 and that was \$11,148.56, plus a car and expenses.

Q. What year was that?

A. That was in 1946.

(Testimony of J. J. McDonell.)

Q. What did you earn in 1947 for the half year?

A. I left Walton N. Moore about the middle of July, and up until that time they paid me \$7652.00 for the first 6½ months.

Q. And then in addition to that did you receive your travelling expenses?

A. Travelling expenses and car expense, that is right.

Q. Now, for the year 194— from the time you went to work until the end of 1947, have you computed what your earnings would be on the basis of \$15,000.00 a year? A. \$4615.00.

Q. And how much were you paid?

A. \$2400.00.

Q. And that leaves a balance of how much?

A. \$2215.00

Q. Which is owing to you for 1947?

A. Which is owing to me for 1947.

Q. All right. Now, was this agreement about your guaranteed salary ever changed?

A. At the time Mr. Hacker bought out Mr. Byrnes.

Q. When was that?

A. That was in the latter part of October of 1947. Mr. [42] Hacker bought out Mr. Byrnes and at that time he asked me if the profit-sharing, that is the 50 per cent of the profits of the rug department, if I would be willing to forego that, and on that basis he guaranteed me \$20,000.00 a year. However, there was to be a share of the profits if there was profits made over and above the \$20,000 a year, but in lieu of the

(Testimony of J. J. McDonell.)

share of the profits of the rug department and my guarantee of \$15,000.00 he increased the salary to \$20,000.00 a year guaranteed, and I wasn't only to participate in the profits of the rug department but of the business as a whole if there was any profits above—I still had a guarantee of \$20,000.00

Q. And when did that—do you recollect when the \$20,000.00 guaranteed salary commenced? When did you figure it from?

A. I figured it from the first of 1947. However, the first meeting we had was on November 5, 1947, in which the preliminaries were discussed, and on November 30th of the same year we had another meeting at which time Mr. Egan and Mr. Savage and all the men who were made directors of the company and were to participate in the profits of the company above their guaranteed salaries were at the meeting. That was on November 30th. However, on January 15, 1947, there was another meeting—

The Referee: Wait a minute now. You have just testified about a meeting on November 30, 1947. [43]

A. 1948; I'm sorry. On January 15, 1948, there was another meeting at which this was all confirmed.

Q. By Mr. Kronick: Who was present at that meeting?

A. Mr. Egan, Mr. Shuler, Mr. Mauger who was controller of the company, Mr. Hacker, Mr. Savage. I believe that is all. I don't believe Mr. Hacker's attorney, Mr. Gold, was there at that time.

Q. Do you recall—I just want to get the conversation, your Honor.

Testimony of J. J. McDonell.)

The Referee: Isn't there any scrap of paper on his at all, counsel?

Mr. Kronick: There were some notes made——

The Referee: I mean anything signed by anybody, any directors' minutes or anything like that?

Mr. Kronick: There was supposed to be minutes of this meeting and we have asked for them and they say they are not available, that they can't find any. Now, we have Mr. Mauger, who is secretary of the company who made notes and handed them to Mr. Gold, the attorney, of this meeting on January 15, 1948, stating all these facts, and we have a witness who was present——we have a witness here who was present.

The Referee: You have no documentary evidence at all?

Mr. Kronick: No, we have asked for the minutes and they say they haven't got them.

The Referee: Did you serve a notice to produce on the [44] Trustee?

Mr. Kronick: No, we haven't.

Mr. McDonnell: Who was asked, Mr. Kronick?

Mr. Kronick: Mr. Benjamin asked you if there were minutes and you said no.

Mr. McDonnell: Not to my knowledge, Mr. Kronick.

Mr. Gilbert: Counsel, I made that demand on the assignee for the benefit of creditors for that information, as well. I was informed that there were no such minutes.

(Testimony of J. J. McDonell.)

The Referee: You were informed that there were such minutes?

Mr. Gilbert: I was informed, your Honor, that there were no such minutes, and as a matter of fact——

The Referee: All right, let's handle this in a legal manner. I want to know first whether or not there is anything in writing on this very difficult question here.

Mr. Kronick: We should say there should be, or they have either evaporated or are not available.

The Referee: Were there minute books, Mr. McDonnell?

Mr. McDonnell: There certainly were, your Honor.

Mr. Kronick: Are they here?

Mr. McDonnell: No, they are not here. I wasn't aware there had been a directors' meeting on these wages.

The Referee: All right, go ahead with this meeting.

Q. By Mr. Kronick: Now, what was said at that time by Mr. Hacker as to what your salary would be that year? [45]

A. \$20,000.00 a year guaranteed.

Q. And were you also to get——

A. And I was to participate in the profits to this extent——

Q. Profits in what?

A. Of the whole organization. If there were any profits made——Mr. Hacker was to draw a salary of

(Testimony of J. J. McDonell.)

\$25,000.00. He was to get 50 per cent of the profits. The other 50 per cent of the profits was supposed to be split up between 4 employees. I was to get 30 of the 50 per cent which was left, which would be 15; Mr. Egan was supposed to get one-third of the balance, Mr. Shuler was supposed to get one-third of the balance, and Mr. Savage was supposed to get one-third of the balance; but that was irrespective of the salary feature. We were all guaranteed a flat salary.

The Referee: At this point, Mr. McDonell, I wish you would give me some information on what you mean by a guaranteed salary. What do you mean by that?

The Witness: I was to get \$20,000.00 a year.

The Referee: Well, why do you say "guaranteed"?

The Witness: Well, because Mr. Hacker guaranteed that we would get it.

The Referee: I know, but if he is going to pay you salary of \$20,000.00 a year, that is it. However, if you are to get a certain percentage of something then he might guarantee you that your amount would not be less than a certain [46] amount, but if he is going to pay you a salary, that is it. Now, why do you insist on repeating about a guaranteed salary?

The Witness: It was a guaranteed salary. I expected to get \$20,000.00 minimum. If there was any money made in the corporation I was to get more than that.

The Referee: All right, go ahead, Mr. Kronick.

Q. (By Mr. Kronick): Were you to get that \$20,-

(Testimony of J. J. McDonell.)

000.00 whether the company made any profit or not?

A. Mr. Hacker understood when I went with him we talked it over thoroughly, that I didn't feel I could build up the rug department in 2 or 3 months and he told me definitely if it took a year or two it was perfectly okay.

Q. All right. Now, you computed your salary at \$20,000.00 for 1948?

A. That is right.

Q. And what did you receive on account of that salary?

A. I actually drew \$6,900.00

Q. That left a balance of how much?

A. That left a balance of \$13,100.00.

Q. All right. Now, when did you terminate your employment with Hacker-Byrnes?

A. On February 18th of 1949.

Q. Were you still on the same basis?

A. I presume so. There was nothing ever said to me to the contrary. [47]

The Referee: Oh, now, wait a minute. Counsel, we can't be satisfied with just a presumption.

Mr. Kronick: Well, I didn't get through, Your Honor.

The Referee: All right, go ahead.

Q. (By Mr. Kronick): After this meeting on January 15, 1948, were there any conversations or any oral agreements made changing your salary or any percentage—

A. Not anything said at any time. Even when Mr. Hacker took in 2 or 3 new partners there was

(Testimony of J. J. McDonell.)

still never any mention as far as my deal was concerned.

Q. Now, as far as you know, at this meeting on January 15th were notes taken of the statements that were made by Mr. Hacker at that time?

A. Mr. Mauger, who was controller of the company, took notes and typed them up the next day.

Q. Now, for the year 1949 until the date that you left the employ, how much did you—what sum did you compute as the amount owing to you under this arrangement?

A. \$2,307.69, of which——

The Referee: How much?

The Witness: \$2,307.69.

The Referee: Yes.

The Witness: And I drew \$950.00, which left a balance of \$1,352.69.

Q. (By Mr. Kronick): And did you total that?

A. The total of the thing for 1947 and 1948 and 1949 [48] is \$16,667.89.

Mr. Kronick: That is all at this time.

The Referee: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. Now, to begin with, was your position in the Hacker-Byrnes Corporation when you first went to work for them?

A. I was manager of the rug department.

Q. I see; and at that time were you made an officer of the company, an officer or director of the company?

(Testimony of J. J. McDonell.)

A. Not at that time, not until later when Mr. Byrnes was out of the corporation.

Q. Now, when you first went to work you say they had a small rug department?

A. That is right.

Q. And did you have anybody selling for you in the rug department?

A. Yes, I had Bob Shuler.

Q. Was he the only one at that time?

A. He was the only one at that time.

Q. And do I understand that as the months and the years went on you built the rug department up increased its size?

A. The first month or the first few months—as I say, Mr. Hacker didn't have any of the major lines of carpet or [49] anything. We didn't have anything much to sell. By the end of that year—I started in September. By the end of that year we had secured one contract on which there was about \$9,000.00 profit made. That was the second year I was there. After Mr. Byrnes got out and after the first of the year finances were such, getting tighter all the time, that it made it almost impossible to get merchandise.

Q. Well, now, all through the latter part of 1947 and the early part of 1948 did anybody but Mr. Shuler work for you in the rug department?

A. Yes, his brother worked for us.

Q. Anybody else that worked under you?

A. Mr. Hacker brought in two or three boys in

(Testimony of J. J. McDonell.)

he hard surface division that worked out of our
Vilshire store out there.

Q. And you had charge of all these people?

A. Yes.

Q. Now, you say you became an officer and direc-
tor at one time? A. Yes.

Q. When was that?

A. At the November 30th meeting, 1947.

Q. And what was the position you assumed?

A. Well, Mr. Hacker made me Vice-President
and General Manager.

Q. And did you continue as Vice-President and
General [50] Manager until you terminated your
employment with Hacker-Brynes Corporation?

A. No. Some time late in—or about the middle
of the year, 1949, I resigned. Q. Or was it 1948?

A. 1948. I resigned as an officer of the company.

Q. Did you continue as general manager?

A. Yes.

Q. And did you continue as general manager up
until the end? A. Yes. I would say so.

Q. I see; and all that time you had people under
your direction and employ? A. Yes, sir.

Q. Now, you went to work for the Hacker-
Brynes Corporation and you say you were guaran-
teed a salary of \$10,000.00 a year?

A. No, I said \$15,000.00.

Q. 15. I'm sorry. And then as I understand your
testimony that was not dependent upon any income
that the rug department might derive from the—
that the corporation might derive from the rug de-
partment? A. Positively.

(Testimony of J. J. McDonell.)

Q. Was it in any way related to the income the company might make in general,—that is, exclusive of or in addition to whatever the rug department made? [51]

A. Any bonus that I would have received would have been in——

Q. I know, but aside from the bonus or a share of the profits, I'm talking about the \$15,000.00 that you say was guaranteed to you.

A. That is right.

Q. Was that in any way related to any profit the corporation might or was supposed of you hoped it would make?

A. I would presume that—whether it was the rug department or the appliance department or whatever department made the money I would still get it, because it was Mr. Hacker's business.

Q. Well, was it your understanding you were to get a guarantee of \$15,000.00 if he took a loss?

A. I had a definite guarantee. I wasn't going to quit a job that was paying me \$7500.00 in 6 months on a gamble with Mr. Hacker.

Q. You were promised this rain or shine \$15,000.00 and other inducements besides?

A. That is right.

Q. About when in 1947 was that agreement made?

A. In September, 1947.

Q. And when did you begin negotiations with the Hacker-Byrnes Corporation for that contract?

A. Mr. Hacker came up to San Francisco when I went up to resign. [52]

Testimony of J. J. McDonell.)

Q. That was in September of 1947?

A. August of 1947.

Q. And you and he discussed it at that time in San Francisco?

A. Yes.

Q. Was there a written contract for this \$15,000.00?

A. No.

Q. How long were you to get the \$15,000.00? What was the understanding on that? How long was that contract to run, just one year or longer?

A. There was no specified time on it.

Q. Was there any provision for you to be discharged in less than a year?

A. No, because I presumed—I had known Mr. Hacker for a good many years; in fact, before Mr. Byrnes ever got in his corporation Mr. Hacker wanted me to come with him. I had known him for about 20 years.

Q. Now, this \$15,000.00 contract was altered in the latter part of 1947 at this directors' meeting?

A. That is right.

Q. And you were then put on a guarantee of \$20,000.00?

A. That is right.

Q. Now, was that \$20,000.00 guarantee in any way related to the profit made in general by the Hacker-Byrnes Corporation?

A. No, sir. [53]

Q. You were to get the \$20,000.00 whether the Hacker-Byrnes Corporation was a profitable operation or not?

A. That is right.

Q. Of course, the profit end of it was connected to whatever profit the rug department would make?

A. No, the profit end of it on the new deal was

(Testimony of J. J. McDonell.)

dependent upon the business as a whole, not only the rug department only.

Q. This new deal was to be drawn from the profits made by the business as a whole as well as the rug department?

A. Outside of the guarantee.

Q. And how were these profits to be figured, before or after taxes? These profits which you in prospect at least were to share, how were they to be computed?

A. I would presume after taxes.

Q. Was there any discussion about it?

A. No, there was no discussion about it at all.

Q. At any time after you came into the employment of Hacker-Byrnes to your knowledge was the rug department profitable?

A. Yes, we had 2 or 3 profitable months.

Q. You were acquainted with the operation of the rest of the business, were you? A. Yes.

Q. And was the entire operation profitable at any time?

A. It was for the first 6 or 7 months I was there, I [54] would say. In fact, in fact, I would say that some of the things that happened in the latter part of 1948, if they hadn't happened, I think the business was a going business and could have been a successful business.

Q. Now, when you went to work for Mr. Hacker in the Hacker-Byrnes Corporation in 1947, how much did you draw on the first pay check you drew?

A. \$150.00.

Testimony of J. J. McDonell.)

Q. And that represented what pay period?

A. That was one week.

Q. \$150.00 is not \$15,000.00 a year, is it?

A. That is right.

Q. Well, what was your understanding as to how his \$15,000.00 was to be paid to you?

A. The \$15,000.00 was to be paid to me at the end of the year. In fact, I set my salary at \$150.00 a week. Mr. Hacker didn't set my salary at \$150.00 a week, and if I had thought for a minute there wasn't going to be \$15,000.00 for me at the end of the year I would have set it at more than \$150.00 a week.

Q. And you never at any time then requested that you be paid a weekly division of \$15,000.00 a year?

A. No.

Q. The understanding was you were to be paid lump sum at the end of the year?

A. That is right. [55]

Q. And that was not dependent upon the company making a profit?

A. That is right.

Q. Now, as to the agreement made in January of 1948, how much were you to be paid weekly then?

A. The same thing.

Q. \$150.00 a week?

A. Yes.

Q. In May of 1948 did you take a cut in salary?

A. I took a cut in salary as far as the books were concerned.

Q. You were cut——

A. And Mr. Hacker gave me some extra money to pay the difference.

Q. You were cut to what?

(Testimony of J. J. McDonell.)

A. To \$100.00 a week.

Q. And he made up the difference out of his own pocket every week? A. Yes.

Q. Did he make it up every week?

A. He is about 4 payments short.

The Referee: Let me get this clear in the record now. There was a general agreement among all the people on salary that there was to be a cut and you agreed to that?

The Witness: I wasn't in the agreement. I wasn't at the meeting. I didn't attend the meeting. [56]

The Referee: But on the books it showed you were taking a cut?

The Witness: That is right.

The Referee: And Mr. Hacker slipped you money on the side?

The Witness: That is right.

The Referee: All right. Go ahead.

Q. (By Mr. McDonnell): Mr. McDonell, did you pay income tax on the \$50.00 a week on the side?

A. I did. I can show it on the income tax blank right now.

The Referee: Tell me how it is you received only \$6900.00 in 1948. You said you got \$150.00 a week. Have you got the details of the \$6900.00?

The Witness: Here is the full detail of every pay check I received. It is by quarters here.

The Referee: Just a minute now.

The Witness: It shows \$6100.00.

The Referee: Well, you say that in the first quarter of 1948 you received \$1950.00 in checks.

(Testimony of J. J. McDonell.)

The Witness: That is right.

The Referee: Well, that would be 13 weeks, wouldn't it, at \$150.00 a week? The second quarter you got \$1500.00. Now, what were your checks for during the second quarter? How much was each individual check?

The Witness: I have them listed there, Your Honor. [57]

The Referee: Where?

The Witness: I guess not. I guess they are just listed by quarters.

The Referee: Well, can you explain that?

The Witness: Yes, because I believe it was in May when the rest of them took a cut my check was cut from \$150.00 to \$100.00.

The Referee: But where do you show here the money you got on the side?

The Witness: I added it on to my——

The Referee: What?

The Witness: Here is \$800.00 of it right here, I got extra from Mr. Hacker, which makes the \$6900.00.

The Referee: All right, in the whole year you got \$800.00, but it still doesn't explain it. 52 weeks at \$150.00 a week is \$7800.00.

The Witness: That is right.

The Referee: All right. Now, how do you account for the fact that you only got \$6900.00?

The Witness: Well, I guess I was just some short. I thought it was——

(Testimony of J. J. McDonell.)

The Referee: Well, now, listen, mister, you are here to give us information.

The Witness: Well, this is what I actually got.

The Referee: All right, will you tell us why you only got \$6900.00? How did that happen? [58]

The Witness: Well, Mr. Hacker was probably a little short and didn't make up the balance for me.

The Referee: Well then, you didn't get \$150.00 a week, is that right?

The Witness: No, he gave it to me a hundred at a time or two hundred at a time, whenever he happened to have it.

The Referee: Go ahead, Mr. McDonnell.

Q. (By Mr. McDonnell): Can you explain to us, Mr. McDonell, why it was that you got the difference or at least most of the difference in your salary cut made up when others who testified here today evidently did not? Was there some arrangement about that with Mr. Hacker? A. No.

Q. He just came around gratuitously and gave you the difference?

A. Well, I think that Mr. Hacker felt that I had probably made more money than anybody else in the organization prior to the time of coming there and if I was only getting that amount of money it was quite a cut to me.

Q. Did he say anything to you about making it up? A. Definitely. He said——

Q. When was that that he discussed that with you?

Q. Well, whenever he happened to come out to

(Testimony of J. J. McDonell.)

he store he might bring a hundred dollars or two hundred, and it probably happened 5 or 6 times in the year.

Q. I mean did you have a discussion with Mr. Hacker about [59] making up the difference?

A. Well, I talked to Mr. Hacker I believe it was in September of this last year when Maury Sommers and Mark Byar and Dave Kaplan, who were the other partners in the business—at that time I had no other job offered to me and I was going to leave, and Maury Sommers assured me at that time that they were going to put 75 or 100 thousand dollars in the business and that we could still build up a good business, and that was the only reason I stayed.

Q. Was that the first time you had gotten the difference between your \$100.00 that was showing on the payroll check and the \$150.00 that was your regular salary?

A. No, sir.

Q. Mr. Hacker just gave you the difference without ever saying why he was doing it or anything?

A. He told me he was going to make it up to me, whatever I was short.

Q. Did he ever make it up to anybody else?

A. Not to my knowledge.

Q. You say you were guaranteed \$15,000.00 in the latter part of 1947?

A. Yes.

Q. And when was the difference between your weekly drawings of \$150.00 and the \$15,000.00 to come to you?

A. At the end of the year.

Q. Would that have been at the end of a year of employment? [60]

(Testimony of J. J. McDonell.)

A. Well, that would be in September the next year.

Q. And was the same understanding had when your salary was increased to \$20,000.00?

A. I would say so, yes.

Q. In other words, you were to receive the difference in December of 1948? A. Yes.

Q. Well, were you aware that Hacker-Byrnes was having financial difficulties at any time in 1948?

A. I was the tail end of the year, yes.

Q. Did you go in at any time and ask for the difference that was due you or would be due you at the end of the year, between \$150.00 a week and the \$20,000.00?

A. Not until September, 1948.

Q. You went in and asked for it then?

A. Yes.

Q. Did you get it? A. No.

Q. That was when Mark Byar and the rest came in?

A. Yes. Well, they had been in the corporation before.

Q. That was in September, 1948, you made that demand? A. Yes.

Q. And where did you make it?

A. The Broadway store.

Q. Who did you make it on? [61]

A. Mr. Hacker.

Q. Anybody else present when you made the demand? A. No.

Q. And he didn't pay you anything at that time?

Testimony of J. J. McDonell.)

A. No.

Q. What explanation did he give you then?

A. Well, Mr. Hacker figured right up to the last e was going to be able to work out of this situation.

Q. But what did he say on that occasion, he couldn't pay you or what?

A. He did, but he would pay me "as soon as we get on our feet."

Q. And you agreed to go ahead on that basis?

A. That is right.

Q. Did you ever receive any bonus, Mr. McDonell, other than the sums you have told us about?

A. No.

Q. Any extra vacation pay or anything of that nature?

A. No. I received \$450.00 for a trip I made to New York from Mr. Hacker.

Q. That was expenses, was it not? A. Yes.

Q. How about in December, Christmas of 1947, did you get a bonus? A. No, no bonus.

Q. No bonus was paid you? [63]

A. No, sir.

Mr. McDonnell: I think that is all the questions have, Your Honor.

Q. (By the Referee): You have testified that after the \$20,000.00 arrangement went into effect you were to get 30 per cent of 50 per cent of the entire profits of the firm; is that correct?

A. That is correct.

Q. Well, did you ever hear about any profit-sharing plans for the employees as a whole?

(Testimony of J. J. McDonell.)

A. No, the only profit-sharing plans I heard about was the one I mentioned.

Q. Well, that was limited to 3 or 4 of the executives, wasn't it? A. That is right.

Q. Then you never heard of anything like that that these other people testified about?

A. No, that came before my time that I was there.

Q. No, not according to their testimony. I'm not talking about a 3 per cent bonus. I'm talking about the profit-sharing that was to be based upon the individual sales, for instance, individual salesmen. Have you ever heard anything about that?

A. I didn't know anything about that.

The Referee: Any further examination, counsel?

Mr. Kronick: Yes. [63]

Redirect Examination

By Mr. Kronick:

Q. These figures you have been showing to the Court, where did you get those figures?

A. They are from the Hacker-Byrnes payroll checks, the dates of the checks and amount of the check and everything else.

Q. That is an exact record from the Hacker-Byrnes books? A. That is right.

Q. Now, did you at any time have any financial interest in the Hacker-Byrnes Corporation?

A. No. Mr. Hacker at the time he bought out Mr. Byrnes was a little bit short and I think some of the employees gave him a thousand or two thousand.

Testimony of J. J. McDonell.)

and dollars and so on. I gave him two thousand dollars but it was paid back to me.

Q. It was a loan? A. Yes.

Q. Several other employees did the same thing?

A. Yes.

Q. Did you at any time hold any stock in the Hacker-Byrnes Corporation? A. No, sir.

Q. When were you—when you were made a director and officer, how was that brought to your attention? A. He just told me.

Q. When you were made a director and officer of the corporation, did Mr. Hacker say you were an officer and director and that was all there was to it?

A. That is right. Mr. Hacker was the sole owner of the corporation then.

Q. And for several months then—well, you say after the middle, about the middle of 1948, you were no longer an officer or director?

A. That is right. I resigned.

Q. And was it part of your employment to make sales of carpet also? A. Yes.

Q. You were what might be designated a traveling salesman?

A. Not a traveling salesman. We made some calls out of the store but not as a traveling salesman.

Q. You were given an auto expense in addition to your salary?

A. Yes, a hundred dollars a month expenses for my car and whatever incidental expenses I had.

Mr. Kronick: That is all.

(Testimony of J. J. McDonell.)

Recross Examination

By Mr. McDonnell:

Q. Mr. McDonell, you were—or were you conversant [65] with the manner in which the Hacker-Byrnes books were set up while you were there as general manager? A. No.

Q. Do you know whether any reserve was to be set up or was set up to care for this salary of first \$15,000.00 and later \$20,000.00 which you were to be paid?

A. No, to my knowledge there wasn't any set up.

Mr. McDonnell: That is all the questions I have.

Q. (By the Referee): Did they have any directors' meetings of this corporation?

A. Mr. Hacker was a director.

Q. No, answer my question. Did you have any directors' meetings——

A. We didn't have any meetings from the time we were appointed directors until Mr. Hacker sold out to Mr. Sommers and the other boys, and then we just had a request to resign, that is all, as directors of the corporation.

Q. And that was the occasion for resigning, when other people came into the business; is that right?

A. That is right.

The Referee: All right. Any other questions?

Mr. Kronick: That is all.

The Referee: All right, you may step down. Now let's have Mr. Egan.

EDMUND G. EGAN,

[66]

called as a witness, being first duly sworn, testified as follows:

The Referee: And your name is what?

The Witness: Edmund G. Egan.

The Referee: All right, go ahead.

Mr. Gilbert: May it please the Court, our testimony would be much the same as that given by Mr. McDonell as to all the preliminaries.

At or about November of 1947 Mr. Egan was employed by the corporation. He had been employed, he had been an employee for a number of years, and at that time he was a party to these directors' meetings or general meetings of the executives, at which time the matter of their salaries and the matter of a share of the profits of the corporation were discussed, and he and these other gentlemen were made directors and officers of the corporation.

Direct Examination

by Mr. Gilbert:

Q. Mr. Egan, calling your attention to the first meeting in November of 1947, who was present at that particular meeting?

A. There was a—Mr. Hacker was present, Mr. Muhler, Mr. McDonell, Mr. Mauger, and Mr. Savage.

Q. Will you tell the Court briefly what the subject matter discussed at that meeting was as it affects our claim and the claim of Mr. McDonell? [67]

A. Yes. This was right after Mr. Byrnes was bought out with the help of all of us, and Mr. Hacker said that now we could sell, that we had gotten rid of

(Testimony of Edmund G. Egan.)

a partner that was not—with the exception of financially interested in the corporation. He was just more or less a silent partner. Now we had 4 fellows that he could put in command that were workers and that he was more than happy to split the money that he was paying his former partner among the 4 fellows that he felt were the key men.

Q. And approximately how much was being paid to Mr. Byrnes at that time?

A. I think Mr. Byrnes had been getting \$50,000 a year.

Q. And that was not paid? A. Yes.

Q. Now, will you tell the Court what the agreement was at that time or what the plans were in regard to the various—the employment of the various men concerned?

A. Well, Mr. McDonald had come into the organization as the head courier man and he was getting paid that, primarily because he was able to bring in outside lines in order to get merchandise that we didn't have at the time.

Q. Well, will you tell the Court how much Mr. McDonald was to be paid under that agreement?

A. Mr. Hacker was to be paid \$25,000.00 a year. In fact, he took a cut. He figured he should take a cut. He ought to [HE] take a cut so that he could set up a house for these men that had—

Q. How much was Mr. McDonald supposed to get, to your recollection? A. \$25,000.00 a year.

Q. And how much were the other gentlemen to get?

Testimony of Edmund G. Egan.)

A. I was to get \$12,000.00 and Mr. Savage \$12,000.00 and Mr. Shuler was to get \$10,000.00.

Q. And what were the respective positions or particular types of work each of those gentlemen were performing at that time, or were to perform?

A. Mr. McDonell was to be general manager in charge of—how was it set up now? General Manager in charge of—well, now, he was general manager and head of all carpet sales. I was to be Vice-President in charge of contract sales. Mr. Shuler was Vice-President in charge of our Wilshire store; and Mr. Savage was Vice-President in charge of our Broadway store.

Mr. Gilbert: May it please the Court, we don't care to go into the matter of the profit-sharing except if counsel cares to on cross examination, because we are not making any claim for any share of the profits. We are making claim only for the difference between the amounts paid and the \$12,000.00 per year salary.

The Referee: All right, go ahead.

Q. (By Mr. Gilbert): Now, Mr. Egan, I believe there was [69] a subsequent meeting at or about November 30th of the same year. Will you tell the Court what was done at that meeting?

A. At that meeting—a preliminary discussion was made about the 5th of November and the formal agreement was drawn up towards the end of the month, of the same month, November, and a formal agreement was drawn up and minutes were taken of

(Testimony of Edmund G. Egan.)

this particular set-up of these salaries and the bonus arrangement of these different men.

Q. All right, now, at that meeting were directors appointed or selected, as a matter of fact, by Mr. Hacker? A. Yes.

Q. Who were the directors of the corporation?

A. Mr. McDonell—Mr. Hacker was President, of course; Mr. McDonell was——

Q. Just directors now.

A. Mr. McDonell was Vice-President and General Manager; I was Vice-President; and both Mr. Savage and Mr. Shuler were Vice-Presidents.

The Referee: Well, now, this gentleman says a formal agreement was drawn up. What do you mean by that?

The Witness: Well, I mean he took everything down in writing——

The Referee: Who did?

The Witness: Mr. Mauger.

The Referee: Did you ever see it? [70]

The Witness: Yes.

The Referee: You saw it?

The Witness: Yes.

The Referee: All right, go ahead.

Q. (By Mr. Gilbert): And at that time were the terms or conditions of employment, of the employment contract or agreement between the officers and the corporation, any different than those you have described in your statement regarding the earlier meeting?

A. No, sir, they were just about the same thing

Testimony of Edmund G. Egan.)

The only thing that was brought up at the second meeting that wasn't at the first meeting was the amounts and percentages of bonus, but the salaries were still as they were stipulated at the original meeting.

Q. Now, Mr. Egan, would you give the Court your—describe to the Court your particular claim, giving the periods, the time, on which the claim is based, and the various amounts owing to you, that is the amounts paid to you and the amounts owing to you.

A. Yes. Well, I base my claim, to go back to November 5th, on the basis——

Q. (By the Referee): Supposing you give us a little background on yourself first. How long were you with the company before that?

A. Well, I was with Mr. Hacker before the war.

Q. Well, how long continuously were you with Mr. Hacker [71] before November 5, 1948?

A. About 2 years, right after I came out of the army, sir.

Q. And what was your position then?

A. I came out of the army and I went to work as salesman.

Q. And how much money did you make?

A. I started in at \$75.00 a week.

Q. And how much did you make thereafter?

A. Well, I was gradually up until at the end there was making \$150.00.

Q. \$150.00 a week? A. Yes.

Q. That was about Nov. 5, 1947? A. Yes.

Q. You were then making \$150.00 a week?

(Testimony of Edmund G. Egan.)

A. I made \$150.00 a week from November 5th to May 13th of that year.

Q. You are starting at the wrong end of the year. What I'm interested in is what you did and what you made before this new deal went into effect. How much were you making?

A. Well, I think with my—I had a salary and bonus arrangement, a commission arrangement, at the time, and I believe there were months that I made \$100.00 or \$125.00 total.

Q. (By Mr. Gilbert): Per week or per month or what? [72] A. Per week.

Q. (By the Referee): All right. Now then, on November 5, 1947, a new deal came into effect whereby you were to make \$12,000.00 a year?

A. That is right.

Q. All right. Go ahead. How much do you figure you have coming?

A. Well, during that period from November 5th to May 13th, November 5, 1947 to May 13, 1948, I drew a salary of \$150.00 a week. Based on \$12,000.00 a year, which is \$230.77 per week, I had \$80.77 coming for that period.

Q. How much does it amount to?

Mr. Gilbert: Per week?

A. Per week, and that would be 28 weeks.

Mr. Gilbert: I believe you have a total there, Mr. Egan. I have \$1261.56, which is the figure I gave the Trustee.

A. Yes, that is correct; \$1261.56 is what I have coming for that period.

Testimony of Edmund G. Egan.)

Q. (By the Referee): All right, now what after that?

A. Then on May 13th I went back to a hundred a week, and from May 13th to October 21, 1948, I have difference coming between what I drew and what I had coming of \$130.27 for 13 weeks.

Q. And how much is that?

A. That amounts to \$3007.71. Is that right?

The Referee: All right. [73]

Mr. Gilbert: Making a total of \$4269.27.

Q. (By the Referee): When did you terminate your connection with the company?

A. October 21, 1948, sir.

Q. How did that come about?

A. At the time the new directors came into the corporation they decided at that time that they would eliminate bidding on any large construction work which I was in charge of and I felt that my services weren't really needed and I made other connections and moved.

Q. (By Mr. Gilbert): Now, Mr. Egan, being the Vice-President in charge of contract sales will you tell the Court what particular jobs the corporation did during your occupancy of that position and your working at that position?

A. Well, there was an awful lot of them.

Q. Well, give the Court some of the largest.

A. Well, possibly every large carpeting job that was done in the city was done by Mr. Hacker, namely, Harbachs, Prudential, General Petroleum, maybe 2 or 3 dozen schools, Burbank City Hall—a lot of them.

(Testimony of Edmund G. Egan.)

Q. Have you got any rough idea of the amounts of money involved in those contracts?

A. I have only got one real figure in mind. The last month of actual active bidding on work, out of a possible \$125,000.00 worth of work we bid on we sold \$80,000.00.

Q. (By the Referee): And how much profit was made on those [74] jobs?

A. Well, a lot of this work was done after I left, a lot of the work was done while I was there, and I would say they showed a net profit at least of 10 to 15 per cent.

Q. (By Mr. Gilbert): That is from 8 to 12 thousand for an \$80,000.00 job? A. Yes.

Q. At that time you were in charge of contract sales?

A. Bidding and securing contracts, yes.

Q. At \$12,000.00 a year? A. Yes.

Q. Now, Mr. Egan, there has been some uncertainty about the matter of the reduction of the salaries from \$150.00 a week in your case to \$100.00 a week, in May. Would you explain to the Court how that came about?

A. Well, I possibly was the one that recommended it, that everybody should take a cut to help the corporation out over a period of time when we needed the money to possibly pay other bills with.

Q. Was it your intention in recommending that that you were to receive any less on your basic salary, let us say—some people here have referred to it as a

(Testimony of Edmund G. Egan.)

guaranteed salary—when you took that particular cut?

A. No, that was just some immediate help to raise enough capital or lower our overhead enough so we could meet some bills that were pending at the time. We were doing such a [75] large amount of work we needed a lot of capital at certain times to be able to meet our material bills.

Q. Mr. Egan, have you at any time had any financial or pecuniary interest in the corporation other than that as an employee?

A. No, I never did own stock. At the time—there is something that hasn't come up—at the time this agreement was made as far as profit-sharing was concerned, Mr. Hacker stipulated that until—let me put it this way: that when and if the profits were to be split up by those percentages as we have set forth, as they were set forth, they were to be utilized or to be used in making us able to buy stock with that particular percentage of profit rather than taking it out in cash and bleeding the company.

Q. You had an option to purchase stock?

A. Yes. That percentage we were to get was to go towards purchasing stock.

Q. Now, Mr. McDonell, the claimant, has made some reference to the aid that he and you and some others gave Mr. Hacker in purchasing the shares or interest of Mr. Byrnes. Would you just say a word about that?

A. Well, naturally we were all very friendly with Mr. Hacker, we all still are,—in fact, I still work for

(Testimony of Edmund G. Egan.)

him—so that gives you the idea there; so when he came to us for help we hocked and borrowed everything we could to help him out because we knew and felt that without Mr. Byrnes [76] we could go ahead a lot faster; and we did help him out financially, not as much as we would like to.

Q. I believe you said that put \$50,000.00 profits back in the business; is that right? A. Yes.

Q. (By the Referee): Do I understand you to say you loaned Mr. Hacker some money? A. Yes.

Q. Did you get it back?

A. Yes, every penny of it.

The Referee: Go ahead, counsel.

Mr. Gilbert: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. What was your understanding, Mr. Egan, as to when the difference between your weekly salary and this \$12,000.00 a year was to be made up?

A. I assumed that it would be at the end of each year.

Q. Well, was anything said about it outside of your assumption?

A. Yes, there was a definite statement made.

Q. When was it said and by whom?

A. It was said at the meeting.

Q. Which meeting?

A. November 25th or 30th or somewhere in there. [77]

Q. Is that the first or second meeting?

A. The second meeting.

(Testimony of Edmund G. Egan.)

Q. All right, go ahead.

A. And at the end of each year——

Q. Who said that?

A. Mr. Hacker; at the end of each year the salaries were to be made up and the profits figured and the percentages figured out to see what each one had coming.

Q. And I understand you left the employ of Hacker-Byrnes the latter part of October, 1948?

A. October 21, 1948.

Q. And you at that time had some monies coming, the difference between your weekly salary and \$12,000.00?

A. That is right.

Q. And did you make demand for that sum?

A. Yes, I did. I asked Mr. Hacker and he said, "You don't have to leave, but if you are leaving the first chance I have we will get together and figure out what we have coming, what you have coming, and give it to you."

Q. And did you ever go to see him again to try to get the money?

A. Yes, I did.

Q. When did you go the second time?

A. Oh, I would say a month or so later.

Q. That would be in November?

A. Some time. [78]

Q. 1948?

A. The latter part of November, I would say.

Q. And where did you see Mr. Hacker?

A. At 1240 South Broadway.

Q. And were anybody but you and Mr. Hacker present?

(Testimony of Edmund G. Egan.)

A. Oh, I think there was a couple of fellows hanging around but I wouldn't know——

Q. I mean in the immediate vicinity and overheard your conversation? A. No.

Q. And what took place when you went in and saw Mr. Hacker?

A. Nothing except that he——

Q. Well, what did you say and what did Mr. Hacker say?

A. I said, "Well, Al, let's get together here, what have I got coming, etc.," and he said, "Well, I haven't got time to figure it out now; I will figure it out one of these days and let you know."

Q. Did you see him again?

A. I didn't see him again. I called him and I was given the same story.

Q. Did you see him again after that?

A. Oh, yes, I used to see him every now and then.

Q. And did you get the same story?

A. I would have ordinarily filed a claim against the corporation long before I did except I was friendly with Mr. [79] Hacker, and I didn't file my claim until after he had resigned as President of Hacker-Byrnes Corporation.

Q. And then you filed it?

A. And then I filed it, yes.

Q. Have you ever received any payment from Mr. Hacker? I understand you are still in his employ? A. Yes.

Q. Have you ever received any payment on this

(Testimony of Edmund G. Egan.)

sum you claim is due and owing from Hacker-Byrnes Corporation? A. No.

Q. Now, I believe it was in November this agreement started? A. That is right.

Q. Before that time how much had you been making in salary—not in commissions, in salary?

A. \$100.00 a week.

Q. And how long had you been making \$100.00 a week? A. A year prior to that.

Q. And about how much had your commissions averaged in the year prior to that time, or had you gotten any commissions?

A. Yes, I had gotten commissions.

Q. How much had they averaged?

A. Well, that is kind of a tough question. I wouldn't remember that.

Q. Well, can you remember how much income tax you paid [80] for say 1946, or what the income reported was?

A. No, I wouldn't be able to answer that at this time.

Q. When did this agreement start, in 1947 or 1948? A. What agreement is that?

Q. This \$12,000.00.

A. It was to start November 5, 1947.

Q. And that is when you began to get your \$150.00 a week payment? A. Right.

Q. How much did you report in the way of income in 1947? A. Around \$7500.00, I think.

Q. And that covered commissions and the \$100.00 a week you had been getting up to November?

(Testimony of Edmund G. Egan.)

A. Yes, sir.

Q. Was the profit-sharing agreement in substance as Mr. McDonell, the claimant, has outlined it on the stand under this agreement that you began in November?

A. I believe so. Mr. Hacker was to get 50 per cent. The other per cent was to be divided among the 4 officers, and he was to get 30 per cent and the balance of 20 per cent was to be split between the 3 of us.

Q. You were to get one-third of 20 per cent?

A. That is right.

Q. Now, you say this was in the form of a formal agreement? [81]

A. Well, I said it was in the form of a formal agreement, and the fact is—I don't know what is formal and what isn't, but it was written up and typed and I saw a typewritten copy of the minutes of that meeting.

Q. Oh, you are referring to the minutes here when you say "formal agreement"? A. Yes.

Q. Did you ever sign any agreement?

Mr. Kronick: I think that calls for the conclusion of the witness.

The Referee: It is cross examination. Proceed.

Q. (By Mr. McDonnell): Did you ever sign a paper embodying the terms you have outlined here?

A. Did I ever sign one?

Q. Yes.

A. Well, I signed several of those minutes. Now, to say that I actually signed that specific one I wouldn't want to do.

(Testimony of Edmund G. Egan.)

Q. But aside from the minutes did you ever see any kind of paper containing or embodying these terms? A. I did.

Q. Apart from the minutes?

A. Apart from the minutes?

Q. Yes. A. No.

Q. And do I understand your testimony to be, Mr. Egan, [82] that this \$12,000.00 was to be in no way dependent upon the profit that Mr. Hacker made?

A. That was my salary just like—the salary was \$12,000.00 a year of which I was to draw \$150.00 a week towards it, of which the balance was to be made up at the end of the year.

Q. Why wasn't the entire amount to be apportioned on the 52-week basis and paid at that time?

A. Because we didn't want to bleed the corporation of all the cash, you see, in it. We were trying to build up a new business.

Q. And you were hopeful of being able to take it out of the business at the end of the year?

A. Yes, and we would have, too.

Q. But you weren't able to? A. No.

Q. You were in charge of contract sales?

A. Yes.

Q. Did you have anybody working for you, Mr. Egan? A. Yes.

Q. How many?

A. I had two estimators at one time and I think three at another.

Mr. McDonnell. That is all the questions, your Honor.

(Testimony of Edmund G. Egan.)

The Referee: All right, any further questions?

Mr. Gilbert: No questions. [83]

Q. (By the Referee:): Did you get any part of the \$50.00 cut? A. No, sir.

Q. Did you know before today that Mr. McDonell was getting his? A. No, sir, I didn't.

Q. You didn't know that? A. No, sir.

The Referee: All right, step down. Any other witnesses?

Mr. Kronick: Yes, I would like to call Mr. Mauger.

WILLIAM A. MAUGER,

called as a witness, being first duly sworn, testified as follows:

The Referee: And what is your name?

The Witness: William A. Mauger.

Direct Examination

By Mr. Kronick:

Q. What is your present occupation and profession, Mr. Mauger?

A. I am an office manager right now.

Q. And what business?

A. Sacred Records, Inc.

Q. Were you at any time ever employed by the Hacker-Byrnes Corporation?

A. Yes, I have been associated with Mr. Hacker since [84] 1937.

Q. And when did you terminate that association?

A. And we were apart for the two years during the war. We were also apart—I left because of Mr.

(Testimony of William A. Mauger.)

Byrnes. I came back in about—oh, when Mr. Byrnes got out I came back in.

Q. About when was that?

A. I think it was about May of 1947.

Q. Now, were you—did you have any financial interest in the company?

A. No, I did not.

Q. Were you ever made an officer of the company? A. Yes, I was.

Q. Which officer? A. Controller.

Q. Were you ever made secretary or treasurer, or was that what you term controller?

A. I think that is what it is. Mr. Hacker was rather lavish with his terms.

Q. Have you filed any claim against the Hacker-Byrnes Corporation? A. No, I have not.

Q. You have been sitting in the court room and you have heard certain testimony as to a meeting between Mr. Hacker and certain of his chief assistants in November of 1947. Were you present at that meeting? [85] A. I was.

Q. And did you take any notes at that time or at the meeting in January?

A. I took notes in the meeting in November.

Q. And what did you do with those notes afterwards?

A. I wrote them up, typed them up, and sent them to Leo Gold. That is the last I ever saw of them.

Q. Now, do you recall the conversations at that time with reference to salaries and percentages of profits that the various men were to get?

(Testimony of William A. Mauger.)

A. Yes. Mr. McDonell was to get—Mr. Hacker was to draw not more than \$25,000.00, Mr. McDonell was to draw \$20,000.00, Mr. Egan and Mr. Savage I believe were to get \$12,000.00, and Mr. Shuler was to get \$10,000.00.

Q. In addition to that were they to draw any portion of the profits of the company, or share any portion of the profits of the company?

A. Yes. Mr. Hacker said that the profits would be so big that we would just have to split them up, and Mr. McDonell was to get 50 per cent—Mr. Hacker was to get 50 per cent, and Mr. McDonell was to get 30 per cent of that 50. The balance was to be divided between the others.

Q. And are those the points you embodied in your notes you sent to Mr. Gold?

A. That is right, they are.

Q. And were you taking those as minutes of a [86] corporation?

A. Well, I just simply had them down on a piece of paper and then typed them and sent them to Leo Gold to fix them up as minutes of the corporation.

Q. And who was Mr. Leo Gold?

A. He was our attorney.

Q. He was attorney for Hacker-Byrnes at the time?

A. Yes.

Q. And at that time were these men also appointed officers and directors of the company?

A. They were.

Q. And do you recall the positions?

(Testimony of William A. Mauger.)

A. Well, I think it was substantially the way they gave it.

Q. And who made those appointments?

A. Mr. Hacker did.

Q. As you understood the conversations and the statements that were made there, would you say that these amounts of \$20,000.00, \$12,000.00 and \$10,000.00, were given as salaries irrespective of the profits of the company?

A. Yes, they were.

Mr. Kronick: That is all.

The Referee: Cross examine.

Cross Examination

By Mr. McDonnell:

Q. When did you leave the employ of Hacker-Byrnes [87] Corporation?

A. August 31, 1948.

Q. How much money did you draw immediately prior to leaving?

A. I drew \$125.00 until the cut and then I drew \$100.00.

Q. And were you in on this deal where you were to get a share of the profits?

A. No, when I asked Mr. Hacker about leaving the only question he asked me was how many weeks I had been taking that cut, and he restored it to me immediately.

Q. You mean he restored the entire sum to you?

A. Yes.

Q. Why did you sever your connection with the Hacker-Byrnes Corporation?

(Testimony of William A. Mauger.)

A. Well, I was controller and I wasn't satisfied with the way the thing was going.

Q. By that what do you mean?

A. Well, it was being run too fast and loose.

Q. Could you indicate a little more accurately what you mean?

A. Well, one of the men talked about there was no reserve being set up. There was nothing being done as far as I knew to make good any of the promises that had already been made.

Q. And that was the reason that you left? [88]

A. That is the reason that I left.

Q. Because there were no reserves being set up?

A. The money was coming in but it was going out faster than it was coming in, and I just didn't want to continue.

Q. You felt that the corporation was in for a rough financial time; is that correct?

A. I saw it coming and got out.

Q. Did you ever make that remark to Mr. McDonell or Mr. Egan, that you thought that there was no reserve to cover their salary?

A. No, I wouldn't testify to that.

Q. You never discussed that fact with either Mr. Egan or Mr. McDonell?

A. I wouldn't say that I did, no.

Q. Would you say that you did not?

A. I say that I wouldn't say that I did discuss it with them. We talked but I'm not positive whether we talked about that or not.

Q. One way or the other?

(Testimony of William A. Mauger.)

A. That is right.

Q. How much had you been making prior to the time of the meeting in November of 1947, Mr. Mauger? A. \$90.00 a week.

Q. Were you increased at that time to \$125.00?

A. That is right.

Mr. McDonnell: That is all I have. [89]

Q. (By the Referee): You say your salary was \$125.00? A. That is right.

Q. And it was cut to a hundred?

A. That is right.

Q. And then was restored to you when you terminated your employment?

A. That is correct.

Q. Did you have any such thing as a guaranteed salary in excess of that? A. No.

Q. You had no share of the profits?

A. No. Mr. Hacker was a friend of mine and what he said he would pay me I would take.

The Referee: Anything else?

Redirect Examination

By Mr. Kronick:

Q. Did you ever discuss with Mr. Hacker the proposition of setting up reserves to meet these promises?

A. It was a corporation but Mr. Hacker isn't a man that can run a corporation. I have always maintained to his face and I will testify in court that he should be a one-man operator. He does as he pleases, not as he is given advice.

(Testimony of William A. Mauger.)

Mr. McDonnell: Your Honor, that answer is not responsive to the question.

Q. (By Mr. Kronick): No. I mean do you recall ever discussing [90] with him the matter of setting up reserves to meet these salaries and other debts of the corporation?

A. No, I can't recall that I did.

Q. You can't recall that you ever did?

A. No.

Q. (By the Referee): What do you mean, sir, that reserves were not being set up? What were they not being set up for?

A. Well, a corporation should be on the increase. Its financial position should be being consistently strengthened, not weakened, and we were in the position where we had to ask our employees to take less in order to get us over the tight spots, and the accounts payable were growing instead of diminishing.

Q. That is what you mean by a reserve?

A. That is right.

The Referee: I see. Anything else?

Q. (By Mr. Kronick): When you say large amounts of monies were coming in, can you give us some idea of what the income of the company was during say the early part of 1948?

Mr. McDonnell: Your Honor, I can't see that that question is pertinent to this discussion.

The Referee: Sustained. Proceed.

The Witness: No, I can't.

The Referee: Never mind. There is nothing before the [91] Court. Anything else?

(Testimony of William A. Mauger.)

Mr. Kronick: That is all.

Recross Examination

By Mr. McDonnell:

Q. Were you present at this meeting in May of 1948 when the cut for the employees was discussed?

A. No, I wasn't.

Q. Your salary was cut then without you being present?

A. That is right. I think that meeting was held down at the Broadway store and I was out at the Wilshire store, if I remember right.

Mr. McDonnell: That is all.

The Referee: Any other witnesses?

Mr. Kronick: No, Your Honor.

The Referee: Mr. McDonnell, any witnesses?

Mr. McDonnell: I would like to call Mr. Hacker.

RAYMOND M. HACKER,

called as a witness, being first duly sworn, testified as follows:

The Referee: What is your name?

The Witness: Raymond M. Hacker.

Direct Examination

By Mr. McDonnell:

Q. Mr. Hacker, you were President of Hacker-Byrnes [92] Corporation in 1947 and in 1948; is that correct?

A. I was.

Q. You have heard the testimony given by Mr. Mauger and Mr. Egan and Mr. McDonnell concerning some meetings in the latter part of 1947, have you?

A. I have.

(Testimony of Raymond M. Hacker.)

Q. Do you recall those meetings?

A. I do.

Q. With particular reference to the discussion as to the amounts to be paid Mr. McDonell and Mr. Egan, would you relate to the Court your recollection of those meetings, beginning with the first meeting and then the second and then I believe there was a third in January.

A. Well, the first meeting, the one in regards to their salaries that were set up, 20, 10 and 12, that was so. I mean they were set up at that salary. They were to draw so much money. Had there not been any profit at the end of the year, probably if the company would have went on, I doubt very much if the employees would have expected that. Had there been a profit their salaries would have been declared as such.

Q. Mr. Hacker, we are not interested in what the employees might have expected. I want you to tell us what happened at the meeting.

A. Well, their salaries were set up at so much money.

Q. Were they guaranteed that salary? [93]

A. If what I told them was a guarantee.

Q. Well, do you recall what you told them?

A. Exactly that this one was to get 20 and the other 12 and the other 10.

Q. Let's start with Mr. McDonell. Do you recall how Mr. McDonell was to be paid the money?

A. There was no set up how Mr. McDonell was to be paid the money, outside of he was to draw

(Testimony of Raymond M. Hacker.)

\$150.00 a week, which he set his own salary, and we all had confidence there would be enough money in the business that that would be what was to be paid.

Q. Was anything said that Mr. McDonell was only to be paid out of profits the \$20,000.00 or any portion of that \$20,000.00?

Mr. Kronick: I'm going to object to this type of examination. It may be informal here, but I don't think he should lead his witness.

The Referee: All right, don't lead the witness. Tell us what your recollection is of the conversation, Mr. Hacker.

A. The meeting was formed after I had purchased Mr. Byrnes' stock, and before profits were to be divided the salaries were to be set at that much money. That is all I recall on it, Mr. McDonnell. I mean I couldn't tell you something that I don't remember in regards to the situation, outside of that was salaries. To my own mind, my own way of thinking, had there been money those salaries would have been [94] set up and paid at the end of the year.

Q. (By Mr. McDonnell): We are interested in what was said, Mr. Hacker, and not your state of understanding of the thing. Was there any paper signed by you?

A. Not that I know of, no.

Q. But you do remember the setting of the salaries? A. I do.

Q. Did you attend a meeting in May of 1948 involving cuts to be made in the salaries of your employees?

(Testimony of Raymond M. Hacker.)

A. There wasn't a formal meeting. It was just a suggestion from Mr. Egan that to meet our present labor payrolls due to doing this type of work we were doing, that the salaries we were paying were exorbitant.

Q. Well, did you have any sort of a get-together at the Broadway store, Mr. Hacker?

A. Not a get-together. I talked to each one individually.

Q. Now, when you talked to Miss Harris—do you recall talking to her?

A. I must have talked to her.

Q. I'm asking you. Do you recall?

A. No, I don't.

Q. Well, do you recall talking to any of those specifically you can name, that took a cut?

A. Mr. McDonell for one. I told Mr. McDonell at the time that we were reducing the salaries in the organization, [95] and at that particular time I knew that the salary he was drawing wouldn't carry him through, he had illness in his home, and that I would personally take care of anything that was outside, whatever the difference in his salary was I would pay personally.

Q. You don't recall talking to Miss Harris at all specifically? A. No.

Q. Do you recall talking to anybody but Mr. McDonell? A. No.

Q. You don't recall any meeting or get-together of the employees? A. No, I don't.

Q. Do you recall having promised anyone at any

(Testimony of Raymond M. Hacker.)

time that the cuts in salary would be restored or given back to them at the end of the year?

A. No, I don't recall promising anyone they would. I always thought it was a cut. Had there been a profit I would have given it to them at the end of the year, but I never mentioned anything to them about making it up to them, that I can recall.

Q. You don't recall promising anyone you would make that up to them?

A. No, I don't recall promising any of the employees outside of Mr. McDonell that I would make it up.

Q. Do you recall any of the employees approaching you [96] at any time concerning their Christmas bonus?

A. Yes, I do recall something in regard to Christmas bonuses.

Q. Can you recall who it was that approached you?

A. No. I know that it was discussed amongst the ones that were holding responsible positions in the company.

Q. When was that?

A. Oh, in 194—well, 1947 and 1948, after purchasing—in 1947 after purchasing Mr. Byrnes' stock, all bonuses and so forth were—any bonus that was to be paid at that time was just whatever we could afford, during Christmas time, whatever I thought I could pay; but there was no set agreement on the bonus after Mr. Byrnes was purchased out.

Q. Did you ever tell anybody, or write anybody

(Testimony of Raymond M. Hacker.)

any communication, that the Christmas bonuses were not to be set as they had been before the time Mr. Byrnes was bought out?

A. That they weren't to be?

Q. That they weren't to be.

A. I discussed it with them. There was no money to pay them.

Q. Who did you discuss it with?

A. With the executives, all of them.

Q. Who do you mean by "executives"?

A. Mr. Shuler and Mr. Egan and Mr. Savage and some of the other employees in the corporation.

Q. How about Mr. Gregory? Did you discuss it with him? [97]

A. No, I never discussed anything in regards to Christmas bonuses or anything else with Mr. Gregory.

Q. Did you discuss Christmas bonuses with Miss Harris?

A. I did discuss Christmas bonuses with Miss Harris and Mr. Smith in regards to the labor.

Q. When was that you discussed Christmas bonuses with them?

A. Oh, I think it was in January or February, after Christmas.

Q. Of what year? A. Of 1948.

Q. And this was their Christmas bonus or someone else's?

A. That they thought that I should take care of our labor, being that I didn't give them anything for Christmas; so at that time I had them figure out

(Testimony of Raymond M. Hacker.)

what their bonuses would be and I paid all the labor but none of the executives or salesmen in the organization, but the labor I did pay.

Q. Did you discuss with Mr. Smith and Miss Harris at that time their Christmas bonuses?

A. No, it was never brought up.

Q. It was never brought up?

A. Not that I know of.

Q. You don't recall any demand having been made on you by them for the payment of the Christmas bonus?

A. No, I do not.

Mr. McDonnell: That is all I have, Your Honor.

The Referee: All right, cross examine.

Cross Examination

By Mr. Kronick:

Q. Insofar as Mr. McDonell is concerned, when he became employed with you, did you know that he was making approximately \$15,000.00 a year at his former place of employment?

A. I didn't know what Mr. McDonell was making.

Q. Did he ever tell you?

A. Later on he did.

Q. Now, to give the—withdraw that. Now, when you bought out Mr. Byrnes' stock, did you own all the stock in the corporation?

A. I did.

Q. And at this meeting in effect you were voting all of the stock and making these men officers and directors of the corporation?

A. I don't know whether this was a formal meeting or a get-together. Had it been a formal meeting my attorney, Mr. Gold, would have been there. It

(Testimony of Raymond M. Hacker.)

was just a discussion of what was going to be.

Q. What happened at this January meeting? Didn't these men carry titles after that meeting? One was a vice-president—

A. I called my attorney and told him what the various [99] titles were that were going to be given to the various employees.

Q. Did you tell him who the directors were also going to be? A. I possibly did.

Q. How many directors did your corporation have, do you remember?

A. Four or five.

Q. And you told your attorney to draw minutes making these men officers and directors of the corporation?

A. I told him to make them officers of the corporation, that is right.

Q. And none of them held any stock in the corporation? A. That is right.

Q. Now, to give the Court some idea of the extent of your operation, isn't it a fact that the General Petroleum job ran into about \$150,000.00?

Mr. McDonnell: I am going to make an objection to that question, the same objection that I made to a similar one a little while ago.

The Referee: I don't think it makes any difference. Sustained.

Mr. Kronick: If I may argue it, in a big business—Your Honor is questioning the salaries of these—the salaries these executives were getting. In a big

(Testimony of Raymond M. Hacker.)

business, the greater the business the greater the salaries you allow. [100]

The Referee: But the question is what agreement was made, not what will be reasonable. No, it is immaterial. Sustained. Proceed.

Mr. Kronick: That is all as far as I am concerned.

Q. (By Mr. Gilbert): Mr. Hacker, was it your belief that these gentlemen, Mr. McDonell, Mr. Egan, and the others who were working at these salaries stipulated, were under the impression and belief that that was their salary and that was what they were to be paid?

Mr. McDonnell: Your Honor, I'm going to object to that question. We are not interested in what the beliefs of the witness were.

The Referee: Sustained. Proceed.

Q. (By Mr. Gilbert): Mr. Hacker, you referred to the share of profits at the end of the year in a certain percentage. Was that to be above and beyond their fixed salaries?

A. What their salaries were set up to be before profit was divided, that was made up. I personally, if there had been no money to make up the difference of their salary, and being as close to the employees as I was, if we hadn't made any money I didn't figure to pay them any more, but I did tell them that is what their salaries would be because I contemplated making enough money to pay them that type of salary.

Q. Then these gentlemen were laboring under the

(Testimony of Raymond M. Hacker.)

belief [101] that they were to be paid at the stipulated fixed salaries; is that correct?

Mr. McDonnell: I object to that question.

The Referee: That calls for the conclusion of the witness. Sustained. Proceed.

Mr. Gilbert: Well, Your Honor, I'm trying to bring out this point. Mr. Hacker knows and he knows well that these gentlemen were working under an agreement by which they were to receive these monies as a fixed or as has been loosely described a guaranteed salary, and he as the corporation, as the complete and full stockholder and as the manager of the corporation, certainly gave them no reason to believe that they were working for any less money. Now, I simply want that to be brought out in Mr. Hacker's testimony.

The Referee: You still can only put into evidence what was written or what was said. Proceed.

Mr. Gilbert: Very well. I will withdraw the question.

Mr. Kronick: I think he didn't answer one question counsel asked him.

Q. These profits, these percentages, that was discussed at that meeting, they were to be paid to these men over and above these salaries which you have testified to; is that correct?

A. If there was anything left after paying the difference of their salaries, what their salaries were set up for.

Q. Then the profits would be divided? [102]

A. That is correct.

(Testimony of Raymond M. Hacker.)

Q. And for that purpose you were to draw not more than \$25,000.00 a year?

A. That is correct.

Mr. Kronick: That is all.

The Referee: Any other questions, Mr. McDonnell?

Mr. McDonnell: That is all.

The Referee: Any other witnesses, Mr. McDonnell?

Mr. McDonnell: No, sir.

The Referee: Have you any other witnesses, gentlemen?

Mr. Kronick: No, Your Honor.

Mr. Gilbert: No, Your Honor.

The Referee: All right. I think we ought to see, Mr. McDonnell, whether there is anything in writing anywhere. Have you examined the minute book?

Mr. McDonnell: Your Honor, for another purpose I made a cursory examination of the books, the minute books, several months ago, and I don't like to depend on my memory. I cannot recall at this time, but certainly the minute books are open to either of these gentlemen at any time. They are entitled to see them under the Bankruptcy Act.

The Referee: Well, let's make this order. We will take a continuance, it is nearly 5:00 o'clock, and before making any ruling I will want to hear from you gentlemen, to see what your views are. It is too late to do that now. So I'm going to continue these cases to a day certain and [103] at that time counsel

for the Trustee will produce the minute books that may be in the possession of the Trustee.

Mr. Kronick: Here is the position we are in. We have been advised they can't find them. Now, our disinterested witness, our sworn testimony, Mr. Mauer, says he drew them up——

The Referee: Then if the Trustee advises you he doesn't have the minute books you subpoena Mr. Gold to bring them in.

A Voice: Does this affect all of them?

The Referee: As far as I know this doesn't affect the claim of Miss Harris or Mr. Smith. However, I won't decide any of them until I get all the information. It will not be necessary for you people to return unless you want to. I will make a ruling on all these claims at the same time.

A Voice: We will be notified of the ruling?

The Referee: Yes. I will see that you people get copies of the rulings made on the claims: and then you understand of course any person dissatisfied with the ruling made by the Referee has a right to file a petition for a review of the decision by the Judge of the court. However, that is a little technical and costs a little money. I'm not trying to discourage you but I want you to understand it is not an entirely simple operation. I don't want you to feel you have to be content with any ruling I might make, any more than the Trustee. He might be content or he might be discontent [104] and review it.

Now, what date do you suggest?

Mr. Kronick: Any date that don't conflict with

my calendar. I have certain fixed dates in mind I now I can't be here.

The Referee: What about Friday, the 20th, at 2:00 o'clock?

Mr. McDonnell: That is agreeable to me, Your Honor.

The Referee: I already have one matter but it shouldn't take too long, and Mr. Gold is going to be here that day, I think.

Mr. Kronick: I will call him before then.

The Referee: He has an application for \$2500.00 fees that may be ruled on that day. So I imagine he will be here.

What became of Mr. John S. Madison?

Mr. McDonnell: I don't know. There is, I believe, an affidavit of service on that.

The Referee: Anybody know Mr. Madison?

Mr. Mauger: I do. I haven't seen him for a month or so.

A Voice: He left the corporation a long time before this came up.

Mr. Hacker: It is a plain frameup, Your Honor. He thought he would get in and get a little money, and he topped them all. [105]

The Referee: All right, continued to January 20th at 2:00 p.m.

Mr. McDonnell: Your Honor, do you wish Mr. Hacker to return at that time?

The Referee: No, I don't think so unless you gentlemen want him. All I want is to have the record complete by any documentary evidence there may be.

All right, January 20th at 2:00 p.m. [106]

Los Angeles, California; Friday, January 20, 1950;

2:00 o'clock p.m. Session

The Referee: Hacker-Byrnes Corporation.

Mr. McDonnell: Ready.

Mr. Kronick: Ready.

Mr. Gilbert: Ready.

Mr. McDonnell: Which matter is that, Your Honor?

The Referee: Well, we will take the application for fees first.

The Referee: Now we have some objections to claims, Mr. McDonnell.

Mr. McDonnell: Can I have just a moment, Your Honor?

The Referee: Yes, I will take a short recess.

(Recess.)

The Referee: All right, you may proceed, gentlemen. Any further evidence on behalf of the claimants?

Mr. Kronick: If your Honor will remember, you suggested a search be made for the minutes or any other records which would indicate a meeting such as was testified to here last time by these men. I have gotten hold of Mr. Gold and he has found a document which is a resume of the meeting held on December 12th which Mr. Mauger testified to. I would like to introduce it as an exhibit on behalf of the claimants. [107]

The Referee: Is there objection?

Mr. McDonnell: Let me get this straight. You are introducing this simply as Mr. Mauger's notes, not as the minutes?

Mr. Kronick: Well, I don't care what you call them.

Mr. McDonnell: Well, I'm trying to get you to put a handle on it.

Mr. Kronick: I would say they are the minutes of that meeting.

Mr. McDonnell: I won't stipulate to them as minutes. These are not the minutes. I have the minutes here.

Mr. Kronick: Let the Court judge for itself.

The Referee: Well, obviously unless they are in the formal minute book of the corporation and properly signed, or if not in the book if they are written up as minutes and signed or to be signed, they cannot be regarded as minutes. Now, as part of your proof you may offer, perhaps, this document as an original notation made at the time of the transaction.

Mr. Kronick: Well, there is just this point, Your Honor. The transaction that happened just as it happened is the thing that controls, not minutes that may be written up two or three weeks later, whether they are signed or not signed. The thing that controls a directors' meeting is done by word of mouth and transcribed later or at the same time. Now, I say the things that happened by word of mouth and what was [108] said there controls, not the written minutes. We might have no control over the writing up of the minutes. They may be taken out of the book or may never be taken out of the book.

The Referee: Well, as a record made at the time or as minutes?

Mr. Kronick: Well, I will offer it at present as

a memorandum of the meeting that transpired on December 12, 1947, as testified to here, as prepared by Mr. Mauger and sent to Mr. Gold.

Mr. McDonnell: With all due respect to counsel, I will object to the introduction of this piece of evidence because there is no identification of this piece of paper.

Mr. Kronick: We will identify it.

Mr. McDonnell: Well, I would suggest then before it is offered you identify it.

The Referee: All right, let's see if you can identify it.

Mr. Kronick: Well, I will ask Mr. Gold to take the stand and be sworn.

LEO K. GOLD,

called as a witness, being first duly sworn, testified as follows:

The Referee: All right, your name is Leo K. Gold?

The Witness: Yes, sir. [109]

The Referee: All right, proceed, counsel.

Direct Examination

By Mr. Kronick:

Q. Mr. Gold, I show you a document entitled "Regular Meeting Held Friday, December 12, 1947," a typewritten document. Will you state to the Court how you obtained possession of that document and where it came from?

A. I got it from Mr. Mauger.

Q. Was it sent through the mail?

A. It was either sent through the mail or he delivered it to me.

(Testimony of Leo K. Gold.)

Q. And would you say you received it approximately on that date, December 12, 1947?

The Referee: While Mr. Gold is thinking about it we will take a recess for a moment. Mr. McDonnell, there is a message. You may leave the court room if you wish.

Mr. McDonnell: Thank you, sir.

(Recess.)

The Referee: All right, you may proceed, counsel.

Mr. Kronick: Mr. Reporter will you read the last question?

(Question read.)

A. Well, it would have to be after that date.

Q. (By Mr. Kronick): Well, I mean approximately how long after?

A. That I don't remember. [110]

Q. Well, was it shortly after or was it a protracted period?

A. I believe it was shortly after that date.

Q. Now, at that time Mr. Hacker owned all the stock in the corporation, did he not, the Hacker-Byrnes Corporation?

A. He did.

Q. And you were attorney for both Mr. Hacker and the corporation?

A. Yes.

Mr. Kronick: That is all.

The Referee: Any questions?

Cross Examination

By Mr. McDonnell:

Q. Now, Mr. Gold, did I understand your testi-

(Testimony of Leo K. Gold.)

money to be that you got this from Mr. Mauger?

A. Yes.

Q. Did he hand it to you personally?

A. I said I didn't remember if he mailed it to me or handed it to me personally.

Q. How did you identify it was from Mr. Mauger? A. This, Mr. McDonnell?

Q. Yes.

A. Because I remember the transaction as to what happened after I got it.

Q. Well, I still am not clear. You are not sure whether [111] it was mailed to you or came to you by hand?

A. No, but looking at it I notice it seems to be folded, and if it is folded then it probably came in by mail because if it was handed to me Mr. Mauger——

Q. You are then just assuming it was from Mr. Mauger. Is it signed, Mr. Gold? A. No.

Q. Has it any directions or markings or writings to indicate who it is from? A. No.

Q. Now, you say you remember the transaction. Would you explain what you mean by "you remember the transaction"? Was there something beyond this piece of paper you have?

A. In other words, I refreshed my memory when I was called by Mr. Kronick if I ever received such a document. Frankly I didn't remember and so I consulted my files and there it was in my files and then I remembered what had happened. I had gotten this from Mr. Mauger and I called Mr. Hacker about

(Testimony of Leo K. Gold.)

it and I told him that I saw this thing and I told him the thing was fantastic.

Q. What do you mean by "fantastic"?

Mr. Kronick: I'm going to object to this type of cross examination. Here we have claimants who are parties to a transaction. They have entered into a transaction with Mr. Hacker, the president and owner of all of the stock. The transaction is not disputed orally by either Mr. Hacker or [112] anybody else. It is backed up by a document written up and sent to the attorney for the corporation at the present time. Now, if they are permitted in the face of the evidence rule that conversations with third parties relating to a contract cannot be admitted against the claimant, I am going to object at this time that this is not proper evidence.

The Referee: Sustained. Proceed.

Q. (By Mr. McDonnell): Mr. Gold, I hand you a book marked "Minutes" and ask you if you can identify this book?

A. It is the minute book of the Hacker-Byrnes Corporation.

Q. Hacker-Byrnes Corporation, the bankrupt here; is that correct? A. Yes.

Q. I show you a sheet of paper headed "Minutes of Special Meeting of Board of Directors, Hacker-Byrnes Corporation," and beginning "A special meeting of the Board of Directors of Hacker-Byrnes Corporation was held on November 1, 1947," and ask you if you can identify this sheet?

A. Yes, they are the minutes I prepared.

(Testimony of Leo K. Gold.)

Q. And how many sheets were there to the minutes of the meeting of November 1, 1947?

A. I see three there. There were three.

Q. Three sheets, three pages? A. Yes.

Q. You are acquainted with the signature of R. M. Hacker? [113] A. Yes, I am.

Q. I show you a signature on the third page of the minutes of November 1, 1947, and ask you if you can identify it?

A. That is his signature.

Q. The signature of Mr. Hacker?

A. Yes.

Q. Are you also familiar with the signature of Miss Corrine Harris? A. Yes, I am.

Q. And can you identify the signature——

A. It is not Corinne. It is Connie.

Q. I'm sorry. And is that the signature of Connie Harris? A. Yes.

Q. Now, in the minutes you have identified as those you prepared by you—is that correct?

A. Yes.

Q. (Continuing) ——of the meeting of November 1, 1947, I call your attention to an item on the second page thereof beginning, "Discussion was then had referable to fixing of salaries of the directors and officers of the corporation. The following resolutions, having been moved and seconded, were unanimously adopted."

Skipping a paragraph and proceeding to the second paragraph [114] thereunder: "Resolved further, that commencing as of November 5, 1947, the salary

(Testimony of Leo K. Gold.)

of J. J. McDonell, First Vice-President and General Manager of the corporation, be and it is hereby fixed at \$150.00 per week payable weekly.”

Did you prepare that paragraph that I have just read, Mr. Gold?

A. You mean——

Q. With reference to Mr. McDonell’s salary at \$150.00 a week?

Mr. Kronick: I am going to object unless Mr. Gold testifies upon what basis or what information or on whose instructions he prepared that minute. Otherwise it is purely hearsay.

Mr. McDonnell: Counsel finds himself in an odd position. I was attempting to get Mr. Gold to explain it a moment ago. I intend to find out whether there is any difference between the minutes and that note.

The Referee: Are you attacking the minutes?

Mr. McDonnell: No, I’m not attacking the minutes.

Mr. Kronick: It is a prior meeting also.

The Referee: Then the objection is sustained. Do you wish to offer the minutes?

Mr. McDonnell: I wish to offer the minutes of the meeting of November 1, 1947, in evidence at this time.

Mr. Kronick: I am going to object on the ground they are immaterial, Your Honor. They prove nothing in issue here. [115] The record and the testimony here relates to the meeting which was held

(Testimony of Leo K. Gold.)

after that date and has absolutely nothing to do with that particular minute.

The Referee: Overruled. It will be Trustee's Exhibit 1. Wait a minute. You have pulled out too much, didn't you? Didn't you say these minutes were three pages?

Mr. McDonnell: Did I give you more, Your Honor?

The Referee: You didn't give me enough, I'm afraid. Did you? You only gave me two pages of minutes.

Q. (By Mr. McDonnell): How many pages are there? A. Three pages.

The Referee: You haven't given me the first page.

The Witness: Here it is right here.

Mr. McDonnell: Yes, here it is (handing document to the Court).

The Referee: All right, Trustee's Exhibit 1.

TRUSTEE'S EXHIBIT No. 1

Minutes of Special Meeting of Board of Directors

Hacker-Byrnes Corporation

A special meeting of the Board of Directors of Hacker-Byrnes Corporation was held on November 1, 1947, at 10:00 a.m. at the offices of the corporation, 9015 Wilshire Boulevard, Beverly Hills, Calif., pursuant to the foregoing written waiver of notice and consent to holding of said meeting.

Present: R. M. Hacker, Chairman; J. J. Byrnes, being all of the directors of said corporation.

Trustee's Exhibit No. 1—(Continued)

The Chairman of the Board announced that there was a vacancy in the Board of Directors. J. J. McDonell was unanimously elected to fill the vacancy in the Board of Directors.

J. J. Byrnes then submitted his resignation, in writing, as Vice-President, Secretary-Treasurer and Director of this corporation.

By reason of the vacancy in the Board of Directors due to the resignation of J. J. Byrnes, the remaining directors unanimously elected Edmond G. Egan to fill the vacancy in the Board.

Discussion was then had by the Board with reference to the fact that the only office which was filled was that of R. M. Hacker, as President of the corporation. The following persons were then unanimously elected to the offices indicated:

J. J. McDonell: First Vice-president and General Manager of corporation.

Edmond G. Egan: Second Vice-President and manager of Olympic and Broadway store.

Glenn A. Savage: Third Vice-President and manager of Pico and Broadway store.

Robert Schuler: Fourth Vice-President and manager of Wilshire-Beverly Hills store.

Connie Harris: Secretary and general office manager.

W. A. Mauger: Treasurer and Comptroller of corporation.

Discussion was then had referable to fixing the salaries of the directors and officers of the corpora-

Trustee's Exhibit No. 1—(Continued)
tion. The following resolutions, having been made and seconded, were unanimously adopted:

Resolved: That commencing as of December 3, 1947, the salary of R. M. Hacker, President, Chairman of the Board and Director of this corporation, be and it is hereby fixed at Five Hundred Dollars (\$500.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of J. J. McDonell, First Vice-President and General Manager of the corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Edmond G. Egan, Second Vice-President and Director of this corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Glenn A. Savage, Third Vice-President of this corporation, be and it is hereby fixed at One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of November 5, 1947, the salary of Robert Schuler, Fourth Vice-President of this corporation, be and it is hereby fixed at One Hundred Twenty-five Dollars (\$125.00) per week, payable weekly; but commencing as of January 7, 1948, said salary shall be increased to One Hundred Fifty Dollars (\$150.00) per week, payable weekly.

Resolved Further: That commencing as of Novem-

Trustee's Exhibit No. 1—(Continued)

ber 5, 1947, the salary of Connie Harris, Secretary of this corporation, be and it is hereby fixed at Ninety Dollars (\$90.00) per week, payable weekly; but commencing as of November 12, 1947, said salary shall be increased to One Hundred Dollars (\$100.00) per week, payable weekly.

Resolved Further: That commencing as of November 12, 1947, the salary of W. A. Mauger, Treasurer and Comptroller of this corporation, be and it is hereby fixed at One Hundred Twenty-five Dollars (\$125.00) per week, payable weekly .

Discussion was then had by the directors referable to the retirement of J. J. Byrnes, as Vice-President, Secretary-Treasurer and Director of this corporation. It was pointed out that while Mr. Byrnes was in office he rendered services of a value far in excess of the salary which was paid to him, and it was the recommendation of the members of the Board that the 1947 Cadillac 4-door sedan automobile, License No. 65W805, Engine No. 5424576, be transferred to him as an honorarium in appreciation of his excellent guidance of this corporation while he held said offices. On motion duly made, seconded and carried, it was unanimously

Resolved: That the President and Secretary of this corporation be, and they are hereby authorized, to sign any and all documents, including bill of sale, certificate of title and California certificate of registration, which may be necessary to effect the transfer of title and ownership of that certain 1947 Cadillac automobile owned by this corporation,

Trustee's Exhibit No. 1—(Continued)

License No. 65W805, Engine No. 5424576, to J. J. Byrnes in recognition of the work done by the said J. J. Byrnes for and on behalf of this corporation in his capacity of director, Vice-President and Secretary-Treasurer, and in appreciation of his excellent guidance of this corporation while he held said offices.

Resolved Further: That the President and Secretary of this corporation be and they are hereby authorized to execute a general release, for and on behalf of this corporation, to discharge the said J. J. Byrnes from any liability which he may have to the corporation including, but not limited to the balance which he may owe to the corporation, as is reflected on the books and records of the corporation.

There being no further business to come before the meeting, on motion made and seconded, it was Adjourned.

/s/ R. M. HACKER,
Chairman.

Attest:

/s/ CONNIE HARRIS,
Secretary.

[Endorsed] Filed Jan. 20, 1950.

Q. (By Mr. McDonnell): Were those minutes that we have just offered in evidence, Mr. Gold, made off the memo which you have previously been handed by other counsel? A. No.

Q. They were not made off the memo?

A. This memorandum came after that date.

(Testimony of Leo K. Gold.)

Q. Did you incorporate that memorandum in the minutes?

A. How could I? That is dated November 1st, I believe.

Q. Did you incorporate it in the minute book at any time? [116] A. No.

Q. That memorandum was never included in the minute book? A. No.

Q. Could you explain why you never incorporated it in the minute book?

Mr. Kronick: I object to that, Your Honor.

The Referee: Sustained. Anything else?

Q. (By Mr. McDonnell): What is the date of the meeting on the memorandum you were handed, Mr. Gold?

A. It says December 12, 1947.

Q. Did you incorporate any minutes in the book as of December 12, 1947?

Mr. Kronick: I object to this on the ground the book is the best evidence.

The Referee: Well, we will sustain the objection but Mr. Gold may examine the minute book and tell us whether or not he finds any minutes of a meeting—of December 12th, was it?

The Witness: Let the record show that I am looking at the minute book and I see no minutes for December 12, 1947.

Q. (By Mr. McDonnell): Did you prepare any minutes for the meeting of December 12, 1947?

A. I did not.

Mr. McDonnell: That is all.

(Testimony of Leo K. Gold.)

The Referee: All right. Any questions, counsel?

Redirect Examination

By Mr. Kronick:

Q. Mr. Gold, going back to this meeting of November 1st, the minutes which you stated you prepared, isn't it a fact that you also prepared those from a memorandum sent to you by either Mr. Mauger or Miss Harris, the secretary?

A. Well, it was either done by a memorandum or orally, you see.

Q. Well, when you say "orally," who instructed you to draw those minutes of November 1, 1947?

A. That I can't remember. It would either be Mr. Hacker or Mr. Mauger would call up and say—sometimes they would write me a letter and say draw minutes.

Q. Now, I note that in that meeting of November 1st Mr. Byrnes and Mr. Hacker were the directors present at that meeting. Was Mr. Byrnes out of the corporation at that time?

A. On November 1st was the date he got out, and if you will look at the minutes you will notice that he resigned on that date and did not participate in the transaction. Mr. Egan I think came in then.

Q. Do you know whether or not these other gentlemen who were appointed that day were present at this meeting?

A. At this meeting?

Q. Yes. A. I wasn't at the meeting.

Q. Oh, you weren't at the meeting? [118]

A. Oh, no, I'm positive I wasn't at the meeting.

Q. So from the information you have you don't

(Testimony of Leo K. Gold.)

know who was present at that meeting; is that correct?

A. Repeat that, please, Mr. Kronick.

Q. I say as far as your personal knowledge is concerned you don't know who was present at that meeting?

A. I don't even know if there was a meeting. Some of these meetings that were held, they never had any formal meeting. There wasn't a convening of the directors. In other words, we would say, "We need a record covering a bank resolution," for example, and then we would draw it up.

Q. I am referring to this specific one.

A. I really can't remember. In other words, there might have been a formal—I mean there might have been informal discussions. I know I have been down at the store many times, but I can't remember being at this formal meeting. I don't think it was a formal meeting, as a matter of fact.

Q. And do you know whether or not Mr. McDonell or Mr. Savage or Mr. Egan or Mr. Shuler were present at this meeting on November 1st, 1947?

A. I know they were in the store.

Q. That we will admit, that they were working there.

A. Well, that is where the meeting says it was held, you see, but I wouldn't know. I really wouldn't know.

Q. However, you were later informed, weren't you, of [119] a meeting Mr. Hacker had with these

(Testimony of Leo K. Gold.)

gentlemen where these salaries which you say are fantastic were discussed and set up?

A. I didn't say that—I told Mr. Hacker they were fantastic.

Q. But he did say they had been set up; is that a fact?

A. No, that is not the conversation we had about it.

Q. Well, he testified here last week those were the salaries that were set up. Didn't he state that to you?

A. I will have to give you the entire conversation as best I can remember it, and even then I can only give you the substance of it. I couldn't remember the conversation.

Mr. Kronick: Well, I will withdraw the question. That is all.

The Referee: Any other questions, Mr. McDonnell?

Recross Examination

By Mr. McDonnell:

Q. Of your own knowledge, Mr. Gold, do you know that there was a meeting on—what is the date on that piece of paper? December 1st, is it?

A. December 12th?

Q. December 12, 1947.

A. Of my own knowledge? No.

Q. You were not present?

A. I was not present. [120]

Mr. McDonnell: That is all.

Mr. Kronick: Just one more question, Mr. Gold.

(Testimony of Leo K. Gold.)

Redirect Examination

By Mr. Kronick:

Q. Whose possession has this minute book been in say since some time before the assignment?

A. Since—would you kindly give me that and I will tell you when.

Q. A factional fight started there between Mr. Hacker and these new people that came in, and I understand Mr. Hacker resigned and was forced out. I would like to know where this minute book has been say from that time on.

Mr. McDonnell: Your Honor, that question is so ambiguous, I can't figure out what he means by "from that time on."

The Witness: I think I know what he means.

The Referee: I think probably the witness understands it. Objection overruled.

The Witness: When did it leave my possession, is that what you mean, Mr. Kronick?

Mr. Kronick: Yes.

The Witness: I have a letter in my file to Julian Isen of Loeb & Loeb and I transmitted the minute book to him with the stock book for his inspection on September 8, 1948.

Q. (By Mr. Kronick): And you haven't had it in your [121] possession since?

A. No, wait. Something happened after that. In other words, there was some deal that was being developed—no, that is not it. There was a contract that Fred Horowitz was making up with—no, strike that. Fred Horowitz I think came in later. I have it

(Testimony of Leo K. Gold.)

now. Mr. Kaplan was represented by Julian Isen of Loeb & Loeb, and they wanted the employment agreement and he wanted to see the minute book of the corporation, but I think before that the minutes went to Fred Horowitz because he prepared—let's see if I can refresh my memory from the minute book. In other words, Fred Horowitz had it and then Julian Isen. Here it is. That is right. On June 23, 1948, about that date, I delivered the minute book to Fred Horowitz, an attorney in the Union Bank Building, and this employment contract developed, and then I got it back for a short time—I say short. I mean between June and September. Then I sent it to Julian Isen on September 8, 1948, and then I got it back on September 21, 1948. Then I think Mr. Fred Horowitz got it again.

Q. He was the attorney for the new faction, wasn't he?

A. For Mr. Sommers, yes. Let me see if I can tell you that. I can tell that to the best of my knowledge, because Mr. Hacker—they had prepared a resignation for Mr. Hacker. In other words, they were forcing Mr. Hacker out.

Q. Well, you say—

A. I think it is in here. [122]

Q. When did you finally get rid of the book?

A. I gave it to Mr. Horowitz and I don't think I ever saw it again, because—then I heard that Mr. Buchalter had the book, and then I think he turned it over to the assignee.

Q. Just one more question. Isn't it a fact that

(Testimony of Leo K. Gold.)

this memorandum of purported minutes was not put in the minute book because Mr. Hacker told you not to put it in? A. That is correct.

Mr. Kronick: That is all.

The Referee: All right, Mr. McDonnell, any further questions?

Recross Examination

By Mr. McDonnell:

Q. What reason did Mr. Hacker give you, Mr. Gold, for not putting it in the minutes?

Mr. Kronick: Just a minute. That is hearsay. I didn't ask for the conversation.

The Referee: Sustained. Proceed.

Mr. McDonnell: No more questions.

The Referee: All right, anything further from Mr. Gold?

The Witness: If Your Honor please, there are some pencil notations on here.

The Referee: It isn't in evidence yet. Now, what do [123] you want to do with it?

Mr. Kronick: I want to introduce it in evidence as a resume of the meeting of the Hacker-Byrnes Corporation, a directors' meeting, which was held on Friday, December 12, 1947.

The Referee: Is there objection?

Mr. McDonnell: I object to the introduction of that in evidence as a document which has not been identified. It has simply been identified as received through the mail. There is no signature to identify its source or where it came from.

The Referee: Oh, well, let's leave that aside for

a minute. Suppose it is identified, for instance, by Mr. Mauger as an instrument he did cause to be written up, or he did write it himself, still is it admissible in evidence? All it is, it is a memorandum made by someone in attendance at a meeting who was charged with the duty of making such a memorandum. Now, is it anything more than just a memorandum? It could be used, naturally—if Mr. Mauger were still here and were put on the witness stand and he would say, “My memory doesn’t serve me sufficiently to enable me to testify to all the details that transpired, but I did make a memorandum and if I could be allowed to refer to that memorandum it would assist me in testifying,” he could look at it; but can the instrument itself be received in evidence as evidence of what transpired at the meeting? What is your view on [124] that?

Mr. McDonnell: Your Honor, the document as it stands is nothing more than hearsay. It is a record made by Mr. Mauger of things heard and recalled by him at the meeting, and as transcribed by him. It isn’t any record of what he said.

The Referee: Well, I don’t think you can offer in evidence a writing as a summary of the testimony of a witness.

Mr. Kronick: Your Honor, these are minutes. If this is hearsay everyone of the minutes in that book are hearsay. It is a recordation of what happened at a certain date or a certain time.

The Referee: I don't agree with you on that unless you have some authorities on the point.

Mr. Kronick: I mean just as a practical matter.

The Referee: Let me explain my view on it, and if I'm wrong I want you to point out to me why I am wrong.

Trustee's Exhibit 1 is an instrument taken from the formal minute book of the corporation, having been recorded in there. It is signed by the chairman and the secretary of the meeting. Obviously it is not conclusive proof as to what happened at the meeting, but it is competent evidence as to what transpired, subject to being contradicted by other competent evidence.

But the paper you have here is just simply a memorandum [125] made by Mr. Mauger, and I think Mr. McDonnell's objection on that point is not well taken. I think the evidence is connected up. This is the memorandum which Mr. Mauger testified he made up and sent to Mr. Gold, but still it is only Mr. Mauger's conclusions as to what happened and doesn't have the force and sanction of an official minute of the meeting.

Mr. Kronick: Except this, Your Honor: As has been testified to here, these minutes have to start some place. They start with a meeting of a company with the directors present and certain things are said and notations are made. Sometimes or most of the times the persons there do not set the minutes up in legal form, so they send a notation to the at-

torney to set them up in legal form. He sets them up in legal form and sends them back and they are signed.

The Referee: Wait a minute. You take it for granted they are going to be signed, but very often after the attorney puts them in legal form the chairman of the meeting says, "That isn't what happened, that has to be changed," or the secretary says, "That isn't what happened, that has to be changed;" and some corporations, of course, are so formal that they require all directors present to sign the minutes. One or the other may say, "No, that is not my recollection and I'm not going to approve that."

Mr. Kronick: Let's go to a point other than that. Here is a document which does not come from the claimants. [126] It comes from the corporation, from their records, from their attorney. Now, you say this is his recollection of what happened at that meeting. It is not only his recollection of what happened at that meeting. It is the corroboration or it has the corroboration of four or five witnesses, including Mr. Hacker himself; and I think the statements taken by him there as controller and transcribed and set up—they may not be admissible as a minute of this corporation. I didn't introduce them as such.

The Referee: What did you introduce them for then?

Mr. Kronick: I introduced them as a resume of what happened at that particular meeting, at that particular time.

The Referee: All right, let's get down to the law on evidence. Is such a resume admissible in evidence?

Mr. Kronick: I would say under the corporation laws, yes, because that is the way you act in a corporation. The book is under the control of Mr. Hacker. These men are directors practically in name only. He passes a resolution in their presence and sends it on to Mr. Gold and then he tells Mr. Gold not to prepare the minutes. I would say this is additional evidence as to what transpired at that meeting.

The Referee: Well, do you have any authorities on it? If you do, I would like to have them. I don't want to commit error here, but all my inclination is against you.

Do you want to be a friend of the Court, Mr. Gold?

Mr. Gold: There is an authority called the Della Montanya case. It holds that in closed corporations you need not have regular formal minutes.

Mr. Kronick: That is in our favor.

Mr. Gold: Yes, I say that; but I do want to say this, that this thing here, while it was given to me by Mr. Mauger, Mr. Mauger was the one who customarily would tell me that we need a resolution for a certain thing, you see, and then I would draw it up, and it is true that I would send it back to them to be signed. That is true, naturally I did, and if it was incorrect—as a matter of fact, I have some minutes that are incorrect that I had to pull out as

being incorrect. I would strike it and would insert the proper way of doing it.

The Referee: Well, then you say the case holds there need not be formal minutes of a closed corporation, are you saying that to be binding on the corporation there need not be formal minutes?

Mr. Gold: Frankly I don't know how far that case goes. I know that we have been citing it quite frequently. I am surprised I don't know the first name of the case. It is readily available. If I had a Wiggins here I could spot it immediately. He cites it for that authority.

The Referee: No, we don't have that.

Mr. Gold: And the case is good authority for that point. In other words, I gathered from that case that if a [128] meeting were held and it was the intent of the directors that that which transpired at the meeting should be the action of the Board of Directors, you see, then that would be just as good as if it were signed. That is my understanding of the case.

Mr. Kronick: That is my contention.

The Referee: Yes, but that is what bothers me. The instrument we have here now is simply the conclusion of the secretary or the stenographer as to what happened. I am not ruling at this time that the Court cannot consider the verbal testimony of what happened at that meeting and cannot from that testimony arrive at a conclusion as to whether a contract was made or wasn't made between the corporation on the one hand and the individuals in-

volved on the other; but my anxiety here is whether or not it is proper for this Court to receive in evidence this informal resume of what did transpire.

Mr. Gold: It would be from these memorandums that I would construct the minutes.

The Referee: That is true, but still they couldn't be minutes.

Mr. Gold: If Your Honor please, I want both attorneys to know I'm not trying to favor either side, but that is the truth. I would be given either a memorandum, a letter—I have some letters in my file where Mr. Mauger would say, "Change the principal place of business to so and so." I [129] would draw the minutes up and send them back to them; and there would be times when they would call me up and say, "Draw a resolution for the Bank of America."

Mr. Kronick: In other words, that was the custom of the corporation? Part of the custom was to ask you to prepare minutes from a memorandum?

Mr. Gold: Or Mr. Hacker would call me on the phone.

Mr. Gilbert: As to the admissibility of this document as hearsay, may I suggest it is a proper memorandum made in the course of business. We have shown that was customary, that Mr. Mauger was the secretary of the corporation, he attended the meetings. He did as a result of that meeting prepare this memorandum, and that this document, although not having the full force of a formal signed resolution

—or minutes of the directors' meeting as found in the minute book, is nevertheless a proper document to come within the exceptions to be found in the business entries exception to the hearsay rule.

The Referee: Yes, but you have to recognize, counsel, that the custom of this corporation was for all minutes to be signed after they were formally prepared by the attorney.

Mr. Gilbert: Well, we are at this point, where to prove by written documents that these informal minutes as prepared by the secretary who was in fact in attendance at such meeting, he did prepare these notes. Now, I think we [130] have a right, if we are going to establish a fact through out proof, that we should in all instances be entitled to go back and dig up the memorandums if there is any conflict, and there is at this point. We find no such record in the minute book of any meeting being held on December 12th, and for that reason this is consequently the best evidence of such a meeting, and as shown by the secretary's memorandum as such is admissible hearsay.

The Referee: All right, the objection is sustained. It will be marked Claimant's Exhibit A for Identification.

CLAIMANT'S EXHIBIT A FOR IDENTIFICATION

Regular meeting held Friday, Dec. 12, 1947.

Present were R. M. Hacker, Pres. J. J. McDonnell, V. P. & Gen. Mgr. Glenn Savage, V. P. Edmond Egan, V. P. Robert W. Schuler, V. P. W. A. Mauger, Comptroller & Connie Harris, Secy.

Salaries of officers were set as follows:

R. M. Hacker, President	\$26,000.00 Payable 500. weekly
J. J. McDonnell, V.P. & Gen. Mgr.	20,000.00
Glenn Savage, V.P.	12,000.00
Edmond G. Egan, V.P.	12,000.00
Robert W. Schuler, V.P.	10,000.00

However, the present salary checks are to continue as follows:

J. J. McDonnell	150.00 weekly
Glenn Savage	150.00 weekly
Edmond G. Egan	150.00 weekly
Robert W. Schuler	150.00 weekly

until the end of the year, when each officer would be entitled to draw the balance of his annual salary due him. Any monies over and above regular salary checks requested by any officer would have to be voted by the Board.

Officers are to be enabled to buy stock.

At the end of the year, a sum designated by the Board of Directors as distributable profits are to be distributed as follows:

50% to R. M. Hacker which will include bonuses to Mauger, Connie and the office force.

The balance, or 50%, will be distributed as follows:

(Testimony of Edmund G. Egan.)

aries were set up was on or about [132] the 30th of November, 1947?

Mr. McDonnell: I object to that question as leading and suggesting the answer to the witness.

Mr. Kronick: It is a preliminary question.

The Referee: Sustained. You don't need to lead him. Ask your questions.

Q. (By Mr. Kronick): Do you recall the date that you gave at the last hearing as to the date of the meeting wherein the salaries were fixed?

A. Well, there were two meetings that I remember. I believe I testified that happened on the 30th of November.

Q. Now, I show you this document, Claimant's Exhibit A for Identification. Did you ever see that document before?

A. Yes, I believe Mr. Mauger showed it to me before he sent it in to Mr. Gold, to corroborate that this was exactly the way it was supposed to have been.

Q. You saw it before it was sent to Mr. Gold?

A. Yes.

Q. Now, you will note that that document is dated Friday, December 12, 1947. Does that refresh your recollection as to the exact date of the meeting?

A. Well, I don't know how that happened — I don't know how we happened to get on the date November 30th. I don't recollect how I got that date. That is approximately what I thought it was, I guess. This is the first time I [133] have seen this paper

(Testimony of Edmund G. Egan.)

since then, so it could very well have been December 12th instead of November 30th.

Q. Now, looking at the contents of this—where these various salaries are set up, etc., is that the substance of the meeting that was held about which you testified on your last examination?

Mr. McDonnell: I object to the question because Mr. Egan has already testified he testified to several meetings, and that doesn't identify the particular meeting.

The Referee: Read the question, Mr. Reporter.
(Question read.)

The Referee: Do you think that is a proper question, counsel? That is simply asking this gentleman for his conclusion. After all, he testified about the meeting. He was there. He testified as to his recollection of what happened. If he has anything further to add from his recollection—you can't use that to refresh his recollection. He didn't make it.

Mr. Kronick: Well, he saw it at the time it was made, Your Honor.

The Referee: What?

Mr. Kronick: He saw it immediately after it was made.

The Referee: No, I don't think so. Sustained. Proceed.

Mr. Kronick: Nothing further. [134]

Cross-Examination

Q. (By Mr. McDonnell): You stated, Mr. Egan, that you had seen this document in the possession of Mr. Mauger; is that correct?

(Testimony of J. J. McDonell.)

couldn't testify at the present time to the exact date.

Q. But you are sure such a meeting was held?

A. Oh, definitely.

Mr. Kronick: That is all.

Mr. McDonnell: No further questions.

The Referee: Any other evidence? What about this claim of this gentleman who hasn't come in, John S. Madison?

Mr. McDonnell: There is proof of service on file against [140] Mr. Madison.

The Referee: Well, what is it all about?

Mr. McDonnell: I am in a rather peculiar position. I have to depend entirely on what Mr. Hacker tells me about Mr. Madison and his claim, and I can relate that to the Court if you would like to hear it. That is all the information I have and that is the basis on which I brought the objection.

The Referee: Your notice went to the claimant in care of a firm at 208 W. 8th Street in Los Angeles. There is no attorney-in-fact named on the claim, and the claimant's address is given on the claim with the notation, "also send notices to the firm you sent the notice in care of, 208 West 8th Street.

The question is whether the claimant has had notice of these objections.

Mr. McDonnell: He directs on the claim itself that notices be sent to this firm at 208 West 8th Street.

The Referee: He says also send notices.

Well, all right, let's take a short recess and then we will go ahead.

(Recess)

The Referee: All right, gentlemen, the evidence is in.

We have several situations here which are present in all or some of the claims here before the Court.

First, the claims of those who it appears may have all [141] been directors of the company at one time or another, but in any event all of whom had a very substantial profit-sharing interest in the corporation, who assert that they were guaranteed salaries, as they put it. Those salaries have not been paid in full, and they now claim the balance unpaid.

That is one angle.

Then we have the bonus angle where it is contended that all the employees were entitled to an annual bonus of 3 per cent on the total amount of their annual salaries.

Then we have the question of this cutback which, so it is said, was to be restored some time in the future; and we have I think one or two incidental vacation claims. We have a claim for 2 weeks automobile expense or 2 months automobile expense; and also in one of the claims I think there is a claim for additional salary which the claimant said was promised to him or assured him.

Now those are the different situations that we have present in one or more or all of these claims in one way or another.

Well, let's take them up and see what the proper disposition may be.

Let's hear from you first, Mr. McDonnell, on the first situation I mentioned. Were all of these gentlemen members of the board of directors at one time or another?

Mr. McDonnell: I beg your pardon? [142]

The Referee: Were they all members of the board of directors at one time or another? Who are the men who are involved in the salary situation?

Mr. Kronick: There are only 3 directors, Your Honor, in the corporation. The others were made officers.

The Referee: Well, we have Mr. McDonell, Mr. Egan——

Mr. Kronick: Those two were the directors along with Mr. Hacker. The corporation only had three directors.

The Referee: And they claim unpaid salaries.

Mr. Kronick: As officers and employees of the corporation.

The Referee: Yes. Now, is there anyone else in that particular category?

Mr. McDonnell: No, I think those are the only two here.

The Referee: Then was it Mr. Gregory who asserted that Mr. Hacker had said to him, "I guarantee you or promise you a total salary of so much a year?"

Mr. McDonnell: I thought that was Mr. McDonell, Your Honor.

The Referee: No, no, Mr. McDonell and Mr. Egan are involved in this meeting that was held.

Mr. McDonnell: Yes.

The Referee: And where it is alleged they were to have a definite share in the profits with a guaranteed salary, so they put it, of so much money. Those are the only two in [143] that category; is that correct?

Mr. Kronick: That is correct, Your Honor.

The Referee: Now, Mr. Gregory's claim is——

Mr. McDonnell: \$6169.86.

The Referee: Yes, but the number of his claim I want.

Mr. McDonnell: No. 126.

The Referee: Yes. He is the one that asks for \$4625.00 as the balance of a salary of \$10,000.00 which he said he was promised for 1948.

So let's take up Mr. McDonell and Mr. Egan because their claims are for salary and nothing else. Is that right?

Mr. Kronick: That is correct, Your Honor.

The Referee: All right. What do you think about those two claims, Mr. McDonnell?

Mr. McDonnell: Are you confining this for the moment to Mr. McDonell's claim, general claim, in the sum of \$16,064.00?

The Referee: Well, you might just as well consider the two as one claim because I shall not allow Mr. McDonell any priority. I don't think he is entitled to it under the law. If he is allowed anything it will all be as a general claim.

All right, what do you think about that situation?

Mr. McDonnell: Well, when I left the court room after the last hearing I was somewhat dubious about

the situation. I was confused after the testimony, but after examining the [144] minute book, particularly the minutes admitted in evidence, which established under the official seal of the corporation and as an official act of the Board of Directors the salary of Mr. McDonell in the sum of \$150.00 a week and said nothing whatsoever about the additional guarantee which Mr. McDonell claimed was to be his and under which he is filing this claim, I became of the opinion that Mr. McDonell should only be accorded the actual salary granted him in the minutes. Now, this other extraneous document which has been admitted in evidence—not in evidence, but merely for identification, I feel that has no standing in establishing his salary in the face of the formal minutes prescribed by the law in California. The time any such meeting took place is even unclear from the testimony here today. They all admit there were a number of discussions, and I submit it is conceivable that one of the discussions is the one we find embodied in the minutes and establishing the salary of \$150.00 a week; and I feel on that basis the claim of Mr. McDonell should be disallowed.

The Referee: Well, gentlemen, I have no doubt in my mind but what there was a discussion by Mr. Hacker and Mr. McDonell and Mr. Egan and perhaps some other persons along the lines that have been testified to here. Now, what date it occurred isn't clear. Mr. Gold testified that he received the memorandum which is Claimant's Exhibit A for Identification some time after the date which appears on it, and [145] that date is December 12th.

At the previous session we had here the testimony was that the meeting in question or the gathering in question took place probably on November 30th.

I have that in mind. I think there was such a session, and at that time I am satisfied that there was a discussion as to what each of the individuals here involved were to receive, and I am satisfied that it was stated that Mr. McDonell was to get a salary—no, that his share of the profits was not to be less than whatever the amount is he contends for, \$20,000.00 I think a year. Is that right?

Mr. Kronick: That is right.

The Referee: And also that Mr. Egan's share of the profits was not to be less than \$12,000.00, and I am satisfied that those figures were referred to as salaries. Whether they used the term "guaranteed salaries" I don't know, but they just didn't say, "Mr. McDonell shall receive not less than \$20,000.00, Mr. Egan shall not receive less than \$12,000.00," as the term "salaries" was used in that discussion; but it was also agreed that the weekly stipend for each of them should not be more than such and such a figure, as has been testified to here; and I think there was at least a general understanding that the item designated by the term "salary" was in each instance to be paid in full at the end of the year, but from then on it becomes very confusing and very indefinite. I don't think that there was any clear understanding as to just what was agreed to for [146] the time of the payments. It was at the end of the year, but what year? A year from the date the meeting was held? A year from the end of the month in which the meet-

ing was held? The end of a calendar year, or what?

Mr. Kronick: If I may interject, I think the testimony was beginning on the 5th of November, 1947.

The Referee: What?

Mr. Kronick: Beginning as of the 5th of November, 1947.

The Referee: Yes, these salaries were to begin, but it is inconceivable to me that it was ever intended that on the 5th of November, 1948, this very substantial balance remaining unpaid on these salaries was on that day to be payable. They just didn't get down to that fine point. They just said, "It is going to be \$12,000.00 a year, it is going to be \$20,000.00 a year. At the end of that time, at the end of the year, the difference between the agreed weekly check and the total annual salary is to be paid."

There is your indefiniteness on that point.

Now, there isn't any question but what the rule is established in California that officers, directors and stockholders may be creditors of the corporation with which they are connected. Perhaps the 9th Circuit goes farther in that direction than other circuits in the country. So that is the rule of law that we are confronted with here and which we must follow; but along with that rule of law is also the rule that wherever there is a transaction between an officer, [147] stockholder or director of a corporation and the corporation, before any claim arising out of that transaction can be enforced it must be shown to be reasonable and equitable and proper.

Now, for instance, we had the Shanahan case in which there were two elements. The two stockhold-

ers of the company asserted claims against the bankruptcy estate on two different grounds, first, as to money loaned, and secondly, as to unpaid salaries. Now, there wasn't any doubt their claim as to money loaned was fair and equitable because the records show, there was no question about it, they had actually loaned the money. The corporation had received the money; but on the question of their claim for unpaid salaries, which they themselves had fixed, the question immediately arose, was that a fair and equitable transaction. So we never got to the point of decision because we had some good lawyers in the case who proved to be good settlers on both sides and they came in with a compromise which appeared to be reasonable and it was confirmed.

However, we have got exactly the same situation here now. Assuming this arrangement to have been that each of these gentlemen was to receive a quite substantial share of the net profits, and that a portion of the net profits which they were to receive was designated as salary in any event to be paid irrespective of profits, and having in mind that only a rather small percentage of that so-called guaranteed [148] salary was paid currently, was that a fair and equitable arrangement and is it now fair and equitable to permit those claims to stand on a parity with the claims of creditors who dealt at arm's length with this corporation, and who had no interest in their transactions with the corporation except the ordinary, legitimate profit which they as business men could make. Is it fair, is it equitable now to permit these gentlemen to stand on a parity with all

these other creditors on this kind of a transaction? If these men had actually loaned money that went into the treasury of the corporation and the corporation received a hundred cents on the dollar, then we wouldn't have any doubt about it. But what were their services worth to the corporation? Were their services worth \$12,000.00 a year? Were they worth \$20,000.00 a year?

I appreciate Mr. McDonell's testimony that he had made so and so somewhere else, but we do have to recognize that we have here a defaulted business. These agreements were made in November or December of 1947 and on June 21, 1949, according to the record in the matter immediately preceding this, the creditors of the corporation requested their agent, the Los Angeles Credit Managers Association, to take some steps looking to the protection of their interests. In other words, in a comparatively short period of 14 or 15 months, during the time in which these men were to be paid these salaries, this company come almost to the door of the bankruptcy [149] court itself and did finally come into the bankruptcy court, and the Court of necessity must take judicial notice of its records and files to the extent of ascertaining that the claims are not only great in number but substantial in amount. Actually the record of the claims at the moment I think is the filing to this date of 173 different claims. I have no immediate information as to the amount of the claims, but there is a very considerable amount of money owing.

Now, there is a favorite expression that a court

operating on equitable principles as this court does always looks through the form to the substance in order that equity be accomplished and that no injustice be done. Now, if we do that here what do we find? We find that if these claims are allowed—and the claims under consideration here, simply the claims of Mr. McDonell and Mr. Egan, approximate over \$20,000.00—if these claims are allowed it will materially affect the dividends to be paid eventually on the claims of creditors who dealt with this corporation on an arm's length basis.

If we look through the form to the substance, what do we see? The form is a corporation in which these two gentlemen and Mr. Hacker were the directors at the time this transaction occurred. The substance of the thing is in effect a general partnership in which for the moment let us say there were three general partners. Two of them had no proprietary interest in the assets. Upon a liquidation they would have no share of the proceeds of the liquidation, but they did have and each of them did have a very substantial interest in the progress of the company, in the profits it might make.

Now, if they were general partners and if this were a general partnership in bankruptcy, of course their claims, even though for money loaned, would under the State law have to be subordinated to the other creditors.

So there is our consideration here, gentlemen. I go along with the claimants practically all the way so far as their view of the facts is concerned, except that I do find a great deal of indefiniteness as

business, or was it reasonable and fair for them to defer to some later date the payment of such a substantial portion of what they now say was a guaranteed salary. In other words, permitting this company to keep on. If they had had to pay these salaries every day to day, perhaps they would have folded before they did and many of these creditors might have saved a great deal of money which now they have on the books of this company. [153]

That is the point I want you to keep in mind. I'm not quarrelling so much, as I said, with Mr. McDonell having an earning capacity of \$20,000.00 and Mr. Egan having an earning capacity of \$12,000.00 although in his instance I think he didn't make that much money before.

Mr. Kronick: Well, let's take up the point further, Your Honor. What we are saying is that this corporation, despite the fact it might have been improperly run, and I say by Mr. Hacker and the other men that came in, not by those men, was doing a business of hundreds of thousands of dollars and men who handle that much business are entitled to large salaries, and I think Mr. McDonell is entitled to that salary. It is not unfair for a man of his caliber. I understand now that there are substantial assets here. Your Honor is worried about creditors. I am worried about an employee of the company. Let's worry about all of them.

The Referee: Yes.

Mr. Kronick: At the present time if there is nothing further obtained they will pay about 50 per cent which is a fairly good dividend in a bankrupt

case; and further, if these suits are successful against these other men that came in here who ruined the corporation and carried out the assets, the creditors will be paid 100 cents on the dollar.

I agree with Your Honor that everybody should be protected. The man that gives his merchandise should be protected, and the men that give labor should be protected, and [154] if his labor was given fairly that the promise he was to get \$20,000.00 and if there were profits he was to get half, that promise should be upheld. There is an agreement there. I say this meeting constituted a contract between this company and these men. These men had no interest in this corporation. They were made directors by force of circumstances because Mr. Hacker bought out his partner, Mr. Byrnes, and he owned all the stock. His natural intention would be to appoint a couple of his employees on the board of directors. He controlled the situation. They are not at fault, and I think there is a definite contract for a definite amount, and I say it is fair and I say they should not be deprived of these salaries even if they are substantial.

The Referee: All right. Do you want to be heard, counsel?

Mr. Kronick: May I be excused, Your Honor? I have to get over to another court by 5:00 o'clock, and I will leave everything in the hands of my co-counsel.

The Referee: All right, fine.

Mr. Gilbert: I would add, Your Honor, on behalf of Mr. Egan, for one year his salary was being

set at \$12,000.00 a year. I think Your Honor very aptly put the matter of ethics in the case, the matter of services rendered, as affecting the legitimacy of the claim. On Mr. Egan's behalf I would say that there is nothing conceivably inequitable about allowing his claim for salary in the amount of \$12,000.00 [155] a year. He was an officer of the corporation as well as a director, for which he is not claiming any credit. However, he was in charge of contract sales. He was active in obtaining and negotiating the business of the corporation in such projects, such contracts and jobs, as he testified, as Ohrbachs, the Carnation Building, the Prudential Life Building, the General Petroleum Building, involving hundreds of thousands of dollars of work and business of the corporation. That is his work, this floor covering line is his work. He is engaged in it presently. He is considered to be capable and efficient at his work, and is presently engaged.

He is asking for the difference between what he was paid in the sum of \$150.00 a week for some 28 or so weeks and the amount of \$230.77 a week, making a total difference of a mere \$80.00 a week for such time as he was employed, excepting the period of 23 weeks when he, and it was pointed out in his testimony that he suggested that their drawing account or their drawing salaries be reduced voluntarily to \$100.00 a week to give the corporation added cash and added strength. Certainly you can't condemn him for that practice. He had an interest in the corporation. I would add he is a man of family, three children. Certain his labors and efforts were

comparable to that of any other employee, it being testified to by one witness very capably that these people were working day and night until 9:00 o'clock at night, seven [156] days a week, and I feel that a claim of an employee under such circumstances has a greater weight and should have a greater weight with the Court than that of a mere furnisher of material who expects a loss in doing business, who expects to make a profit out of what he furnishes to the corporation, and it now comes in as a general creditor and is not subject to any objection or criticism by the Trustee.

I would also say on behalf of my client, and it was counsel's intention at the time to get around his expression, "guaranteed salary," which was injected into the testimony at an earlier point, that it was not understood that there was any guarantee out of a share of the profits but that there was a basic, agreed salary at which Mr. Egan was employed.

I wouldn't argue with the Court on the point of interpretation there except that it is my honest recollection that that was brought up.

Now, we have seen through Mr. Hacker's testimony that—and it was counsel's hope at one point to show that Mr. Hacker did intend in his own mind to pay these gentlemen these salaries and these profits if and when he was able to. Well, I submit that what Mr. Hacker intended, and I think the Court may infer that correctly from the testimony that has taken place,—you see what he did with Mr.

Gold, keeping the agreement out of the record, his making a side deal with one employee without letting another employee [157] know—all of those things certainly couldn't affect the good faith of these other employees, and I am pleading especially for Mr. Egan, who upon an offer and an agreement which is binding upon the corporation executes an instrument as part of the employment contract and who expects and is here today because he expects to be paid for his services, which I again say is reasonable and fair.

The Referee: All right, anything further? Well, I appreciate the situation these gentlemen are in, and I place more reliance on the testimony of these claimants, generally speaking, than I do upon the testimony of Mr. Hacker, and I have indicated that substantially, so far as the facts are concerned, I practically go along with the facts as contended for by Mr. McDonell and Mr. Egan. But on the equitable side of the situation I cannot see how in equity and in justice this can be held to be a fair and reasonable and enforceable transaction against this bankruptcy estate because if I follow your view of the evidence, that Mr. McDonell was to get 30 per cent of the profits in addition to a salary of \$20,000.00, and that Mr. Egan was to get—what is it?

Mr. Egan: \$12,000.00.

The Referee: No, your percentage.

Mr. Gilbert: Well, here is the way it stood, Your Honor. Mr. Hacker was to get half, out of which he was supposed to take care of Mr. Mauger and Miss

Harris. The remaining 50 per cent was to be divided among four employees, Mr. [158] McDonell who was to receive 30 per cent of the 50, the balance being divided between these three lesser employees.

The Referee: 'Then Mr. McDonell was to receive 5 per cent in addition to the \$20,000.00, where according to my view of the evidence he was to get 5 per cent of the profits with a minimum of 20,000.00.

So according to your recollection of the record he had a greater stake in the success of the business than according to my view of the evidence, and that is why it appears to me that it is inequitable and unfair, and that this transaction is inequitable and unfair, in that when the business failed these men assert that they are creditors on a parity with all the other creditors for such substantial sums of money.

Mr. Gilbert: May I just say this, Your Honor. Both of these gentlemen are not claiming or conceding that they are entitled to any share of the profits of the corporation. I made that statement when I first appeared, that we are not concerned with the problem of profits because there are none, we will admit that, but this agreement we say is separate and separable from the matter of profits. These men were—well, what were they? They were nothing but employees of the corporation. Now, if Your Honor presumes to say that Mr. McDonell is not worth \$20,000.00 a year, I should say that is quite an assertion in view of the showing of what his ability is, what he received in the past, and [159]

what services he performed for this particular organization, a company, a corporation, with five stores and outlets and doing the volume of business that this corporation was doing, and when he was brought into the picture and they added another line the thing started to pick up, and but for the situation that arose afterwards due to the internal strife and the tactics of the proprietary interests, this corporation went down, and to say that these gentlemen are not entitled to such basic salaries as they were promised and as they worked for and have earned is going the distance; and I would just add this—would the Court—I am here actually on behalf of Mr. Egan. Would the Court consider each of these claims as a separate and distinct——

The Referee: I don't think there is any distinction as between the claim of Mr. Egan and Mr. McDonell. I think the principles we have been talking about apply equally to both claims.

Mr. Gilbert: Well, there is a difference between \$12,000.00 and \$20,000.00.

The Referee: I don't think the amount makes any difference.

The next important situation is the one about the cutback. There isn't any doubt but what the employees in voluntarily accepting a cut in pay expected that they would at some later date get that money back. What do you think about that, Mr. McDonnell? [160]

Mr. McDonnell: Well, Your Honor, I think that that is a very accurate statement. The employees expected to get it back, and to give Mr. Hacker his

due, I think Mr. Hacker testified quite clearly he expected they would get it back if the company was successful as he expected it to be.

You must remember that all these people entered into this agreement with Mr. Hacker voluntarily because the company was in a tight spot financially from the standpoint of liquid assets, with the expectation he would be able to pay it back. Unfortunately those sanguine hopes were not fulfilled. I think it was testified there was no definite open statement the money would be paid back to them. Mr. Hacker's statement as to his intent to pay it if and when he got the ability perhaps represents a difference that existed in his mind from that which existed in the minds of his hearers at the meeting which was evidently held at the Broadway store. I think, however, there was no contract on the part of this corporation to pay back the salary cuts, and on that basis these claims, insofar as they are based on this salary cut, should not be allowed.

The Referee: Well, much as I regret it, I'm afraid I will have to agree with you. I wish we could find some legal way to allow these cut-back claims, but I can't find anything in the record which would bring these claims at any time to a maturity. I don't know when any of these people could have filed a cause of action against this corporation [161] for the cut-backs. I think it was simply a situation on the part of the employees and an intendment on the part of Mr. Hacker that as and when it could be done it would be done. That time never came; and I would particularly like to find a way to allow these

claims because of the inequities of the situation on this point. Mr. McDonell didn't get any cut because Mr. Hacker says, "I felt he needed the money," so somehow or other he got his. Mr. Mauger I think served notice he was going to quit and Mr. Hacker gave him his cut-back.

Is there something you wanted to say on that, sir?

Mr. Gilbert: Well, since the matter of facts is being injected, Mr Egan left the corporation some considerable time before Mr. McDonell. I believe he left in—was it October of 1948—when the situation was becoming more unsatisfactory, and if the Court would care to be informed on that point he consulted with me at that time on the matter of bringing an action against the corporation for his back salary and monies owed to him, and I say it is not inconceivable that such a cause of action existed and that these gentlemen in fact hoped or intended to receive any of this money back at the time. It was Mr. Egan who suggested——

The Referee: Oh, I say they expected to get it back.

Mr. Gilbert: Then why are they in no better position than the creditors of the corporation? [162]

The Referee: There is no binding obligation on the part of the corporation to pay them back at any particular time.

Mr. Gilbert: Well, they were the corporation. They were two of the directors. I don't know where the mind of the corporation lay in this matter. It would give Mr. Egan and Mr. McDonell the power, as far as the power of the corporation goes, to de-

termine these matters. I think these two gentlemen did hold the majority vote in the corporation. I think we are reaching a point where we are discriminating against employees in favor of general creditors.

The Referee: No, we are not discriminating against anyone. We have to simply take the matter as we find it.

Now, how about the bonus matter?

Mr. McDonnell: In the bonus matter, I think the same unfortunate mental situation existed there concerning that. First of all, I would like to observe that Christmas bonuses customarily are a gratuity, a gift; but that aside, the letter I believe—was that not introduced in evidence?

The Referee: Yes.

Mr. McDonnell: The letter itself indicates very clearly that it was the hope, the expectation of the corporation that they be in position to pay Christmas bonuses, and I believe that was probably what their idea was, but that was not a binding contract, again. There was no definite contract to pay irrespective of what happened. [163]

I think that there again unfortunately they perhaps did not have a binding contract with the corporation.

Mr. Gilbert: Well, I don't know where a binding contract line can be drawn with a corporation if counsel's reasoning is correct. Maybe you shouldn't be an employee if the corporation is going into bankruptcy.

The Referee: Well, there isn't any evidence upon

which the Court can find there was a binding contract by the corporation to pay these bonuses.

The remaining claim is the matter of Mr. Gregory. I am unable to find there was any contract at all with respect to that balance of salary he claims. Mr. Gregory has, however, one or two other items.

Mr. McDonnell: Are you referring to the \$150.00 unpaid for January, 1949, salary?

The Referee: No, let's see what it is.

Mr. McDonnell: \$100.00 car expense.

The Referee: He has got \$100.00 car expense. What do you say should be done with that?

Mr. McDonnell: Well, this is purely an interpretation of Mr. Gregory's testimony, but I got the feeling, perhaps erroneously but I still have it,—but I got the feeling that the \$100.00 was actually a portion of his salary rather than any expense.

The Referee: In other words, you think it should be allowed? [164]

Mr. McDonnell: I think it should be as compensation.

The Referee: What about his claim for vacation?

Mr. McDonnell: The testimony on that point, Your Honor, is very conflicting, and I believe Mr. Gregory testified that he had a vacation in 1948.

The Referee: Well, I don't remember that, but the whole vacation system is so indefinite that the Court can't make a finding that the employee was absolutely entitled to a vacation. Miss Harris, I think, put it this way, "He gave me one week one year and then the next year he gave me three weeks to make up for the other year," and so on. So it

seemed to be just a progressive situation from time to time.

Well, this may seem very odd, but the only thing I can allow here is a hundred dollars.

Mr. McDonnell: To Mr. Gregory?

The Referee: Yes. The claim of Alice Corinne Harris that is based solely upon cut-back and bonus is disallowed. The claim of Roy B. Smith based solely on cut-back and bonus is disallowed. The claim of John B. Madison is disallowed. The claim of J. J. McDonell—is that solely for salary? Your claim is for salary solely, is it?

Mr. McDonell: Yes, Your Honor.

Mr. McDonnell: No. 7 and 8.

The Referee: The claims of Mr. McDonell are allowed as general, priority denied, claims subordinated to all other allowed claims. [165]

* * *

[Endorsed]: Filed July 11, 1950.

[Endorsed]: No. 12908. United States Court of Appeals for the Ninth Circuit. J. J. McDonell, Appellant, vs. Paul W. Sampsell, Trustee of the Estate of Hacker-Byrnes Corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 23, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,908

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee, etc.,

Appellee.

STATEMENT OF POINTS

The appellant states that the Points upon which he intends to rely on the appeal in this matter, are as follows:

(1) The Order Affirming Referee re: Claim of J. J. McDonell against Hacker-Byrnes Corporation, a corporation, bankrupt, is erroneous in that it ignores the fact that the contract of employment between the appellant and said bankrupt was entered into in good faith by the parties thereto and that at the time same was entered into, said corporation was not insolvent.

(2) Said Order is erroneous in that, although the Referee found that the amount claimed under the employment contract was a valid and enforceable debt, said Referee, without sufficient cause, subordinated the payment thereof to other general creditors.

(3) Said Order is erroneous in that it disregards

the fact that the appellant was only a "dummy" officer and director of the bankrupt corporation and had no financial interest therein whatsoever.

(4) Said Order is erroneous in that it disregards the fact that the contract of employment was entered into in good faith by the parties and that there was no fraud or unfairness connected therewith.

(5) Said Order is erroneous in that it ignores the fact that the amount of salary agreed to be paid to the appellant was fair and reasonable, considering his experience and his rate of remuneration immediately before becoming employed by the bankrupt corporation.

(6) Said Order is erroneous in that it ignores the fact that at the time the bankrupt corporation made an assignment for the benefit of creditors and later when it was adjudicated a bankrupt, the appellant was not an officer or director thereof, but had resigned more than six months prior to said adjudication at the request of new financial interests which had come into the corporation.

(7) Said Order is erroneous in that it affirms a finding of the Referee that appellant's employment with the bankrupt corporation, amounted to a joint venture, when in fact there is no evidence to substantiate said finding.

(8) Said Order is erroneous in that it ignores the fact that if the appellant was paid his claim pro-rata with other creditors, it would not amount to

an unjust enrichment when consideration is given to the value of his services and his previous experience.

(9) That said Order is erroneous in that it ignores the fact that there is no evidence of moral turpitude or any breach of duty by the appellant whereby other creditors have been deceived to their damage or that any act or conduct of his, caused the corporation to become insolvent.

(10) That said order is erroneous in that it ignores the fact that the law makes no distinction between general creditors because one may have rendered services and the other had delivered merchandise.

(11) That said Order is erroneous in that it disregards the fact that no evidence was adduced which could in any manner tend to show that appellant's contract of employment was unfair, inequitable or unjust insofar as other creditors of the bankrupt corporation were concerned.

(12) That said Order is erroneous in that it does not take into consideration and the Referee refused to admit testimony, showing the extent and the magnitude of business transacted by the corporation during appellant's employment therewith.

(13) That said Order is erroneous in that it ignores the fact that the corporation began having financial difficulties in the latter part of 1948, at

which time the appellant was not a director or officer thereof.

Dated: May 7th, 1951.

BENJAMIN & KRONICK,
/s/ By ROBT. I. KRONICK,
Attorneys for J. J. McDonell,
Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 9, 1951. Paul P. O'Brien,
Clerk.

Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

J. J. McDonell, appellant above named, hereby designates the following portions of the record to be contained in the record on appeal in the above entitled matter:

- (1) Involuntary bankruptcy Petition against Hacker-Byrnes Corporation.
- (2) Petition for Order referring proceedings to referee.
- (3) Order of General Reference.
- (4) Order of Adjudication.
- (5) Two claims of J. J. McDonell.
- (6) Objections of Trustee in Bankruptcy to claims of J. J. McDonell.

(7) A transcript of the evidence taken before Honorable Benno M. Brink, Referee in Bankruptcy on January 11, 1950 and January 20, 1950, being that portion of the reporter's transcript of hearings on objection to claims, prepared by H. A. Singeltary, commencing at line 12, page 34 with the testimony of J. J. McDonell, to and including line 16, page 136 and commencing at line 1, page 140 to and including line 26, page 165.

(8) Findings of Fact and Conclusions of Law and Order of Objection to Claims, signed by Referee Brink.

(9) Petition of J. J. McDonell for Review of Order on Objection to his Claim.

(10) Referee's Certificate on Petition for Review of Order on Objections to Claim of J. J. McDonell.

(11) Order Confirming Referee's orders on objection to claims of J. J. McDonell and others, dated February 21, 1951.

(12) Notice of Appeal.

(13) This Designation of Record on Appeal.

Dated: May 4th, 1951.

BENJAMIN & KRONICK,
/s/ By ROBT. I. KRONICK,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed May 9, 1951. Paul P. O'Brien,
Clerk.

No. 12908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

BENJAMIN & KRONICK,

756 South Broadway,
Los Angeles 14, California,

Attorneys for Appellant.



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No. 12908
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENT.

A. The District Court Had Jurisdiction of This Cause.

As a court of bankruptcy, the District Court of the United States had jurisdiction in this cause, pursuant to the Act of July 1, 1898, Chapter 541, Sections 1 and 2; 30 Stat. 544, 545, as amended; 11 U. S. C. A. (Supp.), Sections 1 and 2 (1950). The involuntary bankruptcy petition was filed on April 27, 1949 [Tr. pp. 3-8]. After an order of general reference, the court adjudicated Hacker-Byrnes Corporation bankrupt on May 12, 1949 [Tr. pp. 8-10]. Thereafter appellant filed two claims, one claiming priority for wages in the sum of \$600.00 and a

general claim for balance of wages, in the sum of \$16,064.00 [Tr. pp. 15-18]. Subsequently, on December 14, 1949, the Trustee in Bankruptcy filed objections to the aforesaid claims and a Notice of Hearing on said objections. After hearing on said objections, the Referee, on April 26, 1950, made an order denying the priority of the \$600.00 claim, but allowing same as a general claim and allowing the \$16,064.00 claim as a general claim, with the further order that both of said claims should be subordinated in payment to the claims of all other general creditors of said bankrupt (Act of July 1, 1898, Chap. 541, Sec. 39(a); 30 Stat. 555, as amended; 11 U. S. C. A., Sec. 67(a) (1950) [Tr. pp. 21-34]. Within ten days after the entry of said Referee's Order, appellant filed his Petition for Review by the District Court Judge (Act of July 1, 1898, Chap. 541, Sec. 39(a); 30 Stat. 559, as amended; 11 U. S. C. A., Sec. 67(a) (1950) [Tr. pp. 35-39]; thereafter the Judge wrote an opinion affirming the Order of the Referee dated April 26, 1950, and the Judge's order affirming Referee was entered on February 21, 1951 [Tr. pp. 40-41].

B. The Circuit Court of Appeals Has Jurisdiction of This Appeal.

The jurisdiction of the Circuit Court of Appeals of the United States is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, Chap. 541, Secs. 24, 25; 30 Stat. 553, as amended; 11 U. S. C. A. (Supp.), Secs. 47, 48 (1950)). Appellate jurisdiction over this proceeding in bankruptcy vested in the Circuit Court of Appeals upon the filing on March 21, 1951, of the notice to appeal, the amount involved being in excess of \$500.00 [Tr. p. 42].

II.

STATEMENT OF THE CASE.

This appeal is from the District Court's "Order Confirming Referee's Order on Objections to Claim of J. J. McDonell, *et al.*," dated and entered on February 21, 1951 [Tr. pp. 40-41].

The appellant's claims having been allowed as general claims by the Referee, the Petition for Review by the District Court Judge was directed only to that portion of the Referee's Order relating to the subordination of said claims and, therefore, the only question to be argued on this appeal is whether or not said order of subordination should have been affirmed. Appellant contends that the Court and the Referee were in error in ordering subordination.

The facts in the case at bar, are briefly as follows:

Claimant, J. J. McDonell entered the employ of the bankrupt corporation in the first week of September, 1947 [Tr. p. 52]. That prior to said date, he had been employed by Walton N. Moore Dry Goods Co., for the period of approximately 11 years; at said time he had had 25 years experience in the carpet and floor covering business [Tr. p. 54]. He left his employment with said firm at the request of Mr. Raymond Hacker, president of the bankrupt corporation, who employed him as the manager of the carpet department at a salary of \$15,000.00 per year, plus 50% of the net profits of the carpet department [Tr. pp. 53-54; 64-65]. That for the first 6½ months of 1947 he earned \$7652.00 plus his automobile expenses which would make his annual earnings at that time approximately \$15,000.00 [Tr. pp. 54-55].

On or about December 1, 1947, Raymond Hacker, who at that time owned one-half of the outstanding stock of the Hacker-Byrnes Corporation, purchased the other one-half of the outstanding stock from J. J. Byrnes [Tr. pp. 105]. At the time of the sale, Byrnes resigned as an officer and director and Hacker made the claimant a director and officer of the Hacker-Byrnes Corporation [Tr. pp. 75, 106] and appointed him General Manager of the corporation at a guaranteed salary of \$20,000.00 per year, plus a percentage of the profits [Tr. pp. 58-59]. Claimant at no time owned any stock in the bankrupt corporation nor did he ever have any financial interest therein [Tr. p. 75].

About the middle of the year 1948, some new parties became interested in the corporation, whose names are Maury Sommers, Mark Boyar and Dave Kaplan and claimant was then asked to resign as an officer and director, which he did [Tr. p. 75]. However, he remained as the General Manager of the company. In September, 1948, he attempted to resign as General Manager because he had received an offer of another position, but was requested to stay on by the new parties who told him that they were going to put \$100,000.00 cash into the business [Tr. p. 71]. On February 18, 1949 [Tr. p. 60] he finally resigned and the claims herein, aggregating \$16,646.00, represent the difference between the guaranteed salary agreed to be paid to him and his drawings against the same, from September, 1947, to February 18, 1949. In view of the fact that it has been held that these claims are valid and enforceable obligations, appellant will not burden the Court with the circumstances relating to the

manner and method of paying claimant's salary. The bankrupt corporation, up to the time that the new interests came in, was a one-man corporation, dominated and solely controlled by Raymond Hacker, who up to that time owned all of the stock of said corporation [Tr. p. 105]. Since the bankruptcy, the Trustee has filed suits against the new interests to recover moneys and property, alleged to have been fraudulently withdrawn by them from the corporation prior to its bankruptcy.

The following questions are presented by this appeal:

(1) In view of the fact that it has been held that the claims are valid and enforceable obligations and no fraud or unfairness has been proven in connection therewith, should not the appellant be entitled to receive his pro-rata dividends out of the estate on a parity with other general creditors and not have his claims subordinated to those of other general creditors, which for practical purposes amounts to a complete denial and rejection of his claim, because the assets of the bankrupt corporation are insufficient to pay all other general creditors in full?

(2) As the claimant had not been an officer or director of the bankrupt corporation for about eight months prior to the adjudication in bankruptcy and at no time had any control of the policies of the corporation and as said bankruptcy could not be attributed to any act or conduct of his and as the salary the corporation had agreed to pay him was fair and in keeping with amounts he had earned in previous employment, then should he not be entitled to share pro-rata with other general creditors of the bankrupt estate?

III.

SPECIFICATIONS OF ERROR.

Appellant relies upon the following specifications of error:

1. The District Court erred in assuming that the contract of employment between appellant and bankrupt was not entered into in good faith and that there was fraud or unfairness connected therewith [Tr. pp. 170-172, points 1, 4].

2. That the District Court erred in assuming that appellant was an officer and director of the bankrupt corporation until its insolvency in 1949 and that there were acts, conduct or breaches of duty on his part which contributed to the insolvency, which is contrary to the facts and evidence [Tr. pp. 170-172, points 3, 6, 9, 13].

3. The District Court erred in disregarding the appellant's experience and the amount of salary he received prior to his employment with the bankrupt corporation, as well as the extent and magnitude of the business transacted by the corporation during appellant's employment therewith, in affirming a finding that the amount of salary was inequitable or unjust insofar as other creditors were concerned [Tr. pp. 171, 172, points 5, 8, 11, 12].

4. That the District Court erred in ordering subordination of appellant's claim after same had been allowed as a general claim, in contravention of Section 65a of the Bankruptcy Act [Tr. pp. 170, 172, points 2, 10].

5. That the District Court erred in affirming a finding of the referee that appellant's employment with the bankrupt corporation amounted to a joint venture, when in fact there is no evidence to substantiate said finding [Tr. p. 171, point 7].

IV.

SUMMARY OF THE ARGUMENT.

A. The contract of employment between appellant and bankrupt was entered into in good faith and was wholly free of fraud or unfairness.

B. The appellant was not an officer or director of the bankrupt corporation for some time prior to its adjudication and was not responsible for nor did he contribute to its bankruptcy.

C. The salary agreed to be paid to appellant was fair and reasonable and such agreement was not inequitable or unjust to other creditors.

D. The District Court's Order violates the equality of distribution of general assets guaranteed by the Bankruptcy Act.

E. Appellant's employment with the bankrupt corporation did not constitute a joint venture.

V.

ARGUMENT.

A. The Contract of Employment Between the Appellant and the Bankrupt Was Entered Into in Good Faith and Was Wholly Free of Fraud or Unfairness.

In support of this argument, we need only point out that the Referee found and the District Court affirmed the fact, that the contract of employment was a valid and enforceable one as set forth in Paragraphs I and II of the Conclusions of Law [Tr. pp. 29, 30] and the order of the Referee allowing appellant's claims under said contract as general claims [Tr. p. 33]. The Findings of Fact and Conclusions of Law, therefore, irrefutably support appellant's contention that the contracts of employment between the bankrupt corporation and appellant were free of any fraud or unfairness for the reason that had there been any fraud involved or connected therewith, the Referee would not have ordered the allowance of these claims as general claims and the District Court would not have affirmed such order. The facts involved also support this contention as it was shown, without contradiction, that prior to his employment with the bankrupt corporation as the manager of its carpet department, appellant had had 25 years experience in the carpet and floor covering business [Tr. p. 54]. That immediately prior to said employment he had been employed by the Walton N. Moore Dry Goods Co., for approximately 11 years and that his earnings at the time he came to the bankrupt corporation amounted to approximately \$15,000.00 annually [Tr. pp. 54-55]. It, therefore, could not be asserted in any manner that the contract of employment was tainted with fraud or unfairness, he having

ecome employed by the bankrupt corporation at approximately the same salary that he had been earning prior hereto; also, thereafter when he was given a higher position and more onerous duties by being elevated to the general managership of the business, his guaranteed salary was increased to \$20,000.00 per annum and that such increase in salary was fair and commensurate with the added duties and responsibility. There is no testimony that at the time these contracts were entered into, that the bankrupt corporation was insolvent. As a matter of fact, the only reference made thereto is in Paragraph X of the Findings of Fact [Tr. p. 28] by the wording "that throughout the year 1948 the bankrupt corporation was experiencing financial difficulties due to shortage of liquid capital." The testimony also is that for the first 5 or 7 months that appellant was employed, the operation of the bankrupt corporation was profitable and that the difficulties began happening in the latter part of 1948 [Tr. p. 66]. It must be noted that at that time, appellant was no longer an officer and director as he had resigned prior thereto.

A solvent corporation has the right to do with its money as it sees fit and to enter into such obligations as it sees fit, as long as the dealings are honestly carried on with reference to the creditors and stockholders.

In re American Range and Foundry, 22 F. 2d 558.

This case holds that the fact that a contract for services was entered into with a director who with his son was the sole owner of all of the corporate stock thereof, does not of itself give the court the right to disallow his claim for services filed in bankruptcy or to subordinate it to other creditors, where there is no fraud or unfairness shown.

The failure of the officers and directors in their attempt to make a corporation's business successful, is not a sufficient basis to justify penalizing such officer and for subordinating his claims to other creditors.

Barlow v. Budge, 127 F. 2d 440.

The appellant's position is somewhat stronger, in view of the fact that he was not an officer or director when the contracts of employment were entered into and that for sometime prior to the adjudication in bankruptcy he had ceased to be an officer and director of the bankrupt corporation.

It, therefore, must be admitted that the contracts of employment between the bankrupt corporation and the appellant were freely and fairly made and that no fraud was involved in their making.

B. The Appellant Was Not an Officer or Director of the Bankrupt Corporation for Sometime Prior to Its Adjudication and Was Not Responsible for nor Did He Contribute to Its Bankruptcy.

The foregoing statement is uncontradicted. The appellant became an officer and director of the bankrupt corporation on or about December 1, 1947 [Tr. pp. 75, 106]. He was not elected by any body of stockholders, but was appointed by Raymond Hacker, who at that time owned all of the outstanding stock [Tr. pp. 75, 105, 106]. Until the new interests came into the business, it was a one man corporation solely controlled, managed and dominated by Raymond Hacker [Tr. pp. 97, 106]. Appellant at no time owned any stock in the bankruptcy corporation nor did he have any financial interest therein [Tr. p. 75].

About the middle of 1948 when new parties became interested in the corporation, appellant was asked to and

id resign as an officer and director thereof [Tr. pp. 63, 65]. In September, 1948, he attempted to leave the employ of the bankrupt corporation because he had received an offer of another position, but was requested to stay on by the new parties who had agreed to contribute a large sum of money to the corporation for working capital [Tr. pp. 69, 71]. He is, therefore, further penalized by the Order of Subordination, because he could have obtained employment elsewhere and earned a salary commensurate with his ability. Keeping the foregoing dates in mind, the bankrupt corporation made an Assignment for the Benefit of Creditors on March 21, 1949, and was adjudicated a bankrupt on May 12, 1949. The Findings of Fact and Conclusions of Law, Paragraph IV, assume that appellant was an officer and director during all the times hereinabove mentioned [Tr. pp. 30-32]. This is untrue and is not supported by any evidence whatsoever. As a matter of fact, a studied reading of said Paragraph IV clearly indicates that it is not a Conclusion of Law at all but a series of suppositions created by the Referee, which have no basis in fact and are not supported by any evidence. It is based on two false premises: (1) that the appellant was an officer and director of the corporation from and after November, 1947, to the date of bankruptcy and (2) that if the officers had been paid their guaranteed salaries at regular intervals the corporation would have become bankrupt sooner and thus would have had less creditors. There is no evidence in the record to substantiate these conclusions.

In any event, the mere fact that the business sometime after appellant's association therewith, proved to be unsuccessful and became bankrupt, even if he had been an officer and director at all times, should not of itself deprive

him of the right to share equally with other creditors upon a valid and enforceable claim filed by him against the debtor's estate.

Barlow v. Budge, supra.

C. The Salary Agreed to Be Paid to the Appellant Was Fair and Reasonable and Such Agreement Was Not Inequitable or Unjust to Other Creditors.

The Referee, whose orders were affirmed by the District Court, endeavors in Paragraph IV of the Conclusions [Tr. pp. 30-32] to straddle the issue, by holding that while the contracts were enforceable, they were not fair, equitable or just as against the creditors of the bankrupt corporation. As heretofore shown in Argument C, said conclusions were based on false premises. It has been shown that appellant's starting salary was equal to that which he had received in previous employment and same was increased when he was appointed General Manager. The Findings and Conclusions of Law do not state that these salaries are excessive or that the appellant's services were not reasonably worth the amounts agreed upon. As a matter of fact, the Referee himself supports our contention when he stated [Tr. p. 158]: "I'm not quarreling so much, as I said, with Mr. McDonell having an earning capacity of \$20,000.00 . . ." The only points which are held as evidence to support the Referee's conclusions that the contracts are not fair, equitable or just as against the creditors, are the assumed facts regarding the period during which appellant was

a officer and director and the supposition that if he had collected the guaranteed salary as he went along, the bankruptcy would have been precipitated earlier and perhaps some of the creditors would not have extended further credit to the corporation. As heretofore argued, there is absolutely no evidence to substantiate this conclusion. Neither is there any evidence of moral turpitude or breach of duty on the part of the appellant.

A creditor must have been guilty of some moral turpitude or some breach of duty whereby other creditors have been deceived to their damage, in order to estop him from sharing in the distribution of the estate of the debtor with all other creditors.

Crowder v. Allen West Co., 213 Fed. 177.

"The claims of a corporate officer or director, arising out of transactions with the corporation have been enforced when good faith and fairness were found."

Manufacturers Trust Company v. Becker, U. S. Supreme Court Law Edition, Advance Opinions, Volume 94, No. 2, page 99 at page 103.

The Referee refused to permit the introduction of evidence showing the magnitude and amount of business transacted by the bankrupt corporation, on the ground that the question for him to determine was whether or not there was an enforceable contract [Tr. pp. 106-107]. However, he having found that there was an enforceable contract, this phase of the matter becomes important to show that the appellant's salary was not excessive or un-

fair. However, during the hearing, some evidence was introduced by the witness Egan which clearly indicated that the bankrupt corporation performed some of the largest floor covering jobs in Los Angeles, enumerating some of them as the General Petroleum Building, Orbach's, Prudential Building, two or three dozen schools and the Burbank City Hall [Tr. pp. 83-84]. This testimony clearly supports appellant's contention that his salary was fair and reasonable and in no manner was it inequitable or unjust to the creditors. He gave his ability and experience to the corporation and its bankruptcy was not caused by any act of his but was clearly due to the lack of capital financing [Tr. pp. 62, 66, 85].

While the bankruptcy courts have the power to disallow or subordinate claims in bankruptcy, it should not so operate as to take away anything punitively to which one creditor is justly entitled in view of the liquidation finality and bestow it on others. Any subordination must be scrupulously measured and fitted to the actual injury that has been done or the unjust enrichment that is involved. (Bankruptcy Act No. 2, 57 sub. k, 1 U. S. C. A. No. 11, 93 sub. k.)

In re Kansas City Journal Post Co., 144 F. 2d 791
at 800.

D. The District Court's Orders Violate the Equality of Distribution of General Assets Guaranteed by the Bankruptcy Act.

The appellant is a general creditor whose claims have been allowed in full [Tr. pp. 33]. Since we are dealing with general creditors, the District Court's order is a direct violation of Section 65(a) of the Bankruptcy Act which provides (11 U. S. C. A. Sec. 105(a)):

"Dividends of an equal per centum shall be declared and *paid* on all *allowed* claims, except such as have priority or are secured." (Italics added.)

The claims of the appellant are allowed claims but are not claims having priority under Section 64 of the Bankruptcy Act, nor are they secured claims. Admittedly, the fundamental principle of the act, is equality of distribution among the general creditors. Indeed, that is the very purpose of bankruptcy.

"The Bankruptcy Act contemplates an equal division of the bankrupt's assets, with no preference except those designated in the statute."

In re Moore, 11 F. 2d 62-63.

The effect of the order here, as the court said in *Merchants National Bank v. Sexton*, 228 U. S. 634, 643, "to disregard . . . and to destroy the equality of distribution which it was the purpose of that act to secure."

Therefore, the express provisions, as well as the policy of the Bankruptcy Act, require reversal of the District Court's Order.

E. Appellant's Employment With the Bankrupt Corporation Did Not Constitute a Joint Venture.

The conclusion reached by the Referee in Paragraph IV, subdivision 4 of the Conclusions of Law [Tr. p. 32] *i. e.*, that the provisions of the employment contract whereby the appellant J. J. McDonell was to receive a percentage of the net profits constituted said appellant a joint venturer in the business of the bankrupt corporation, not sustained by the facts and is contrary to the laws of this State. The following elements of a joint venture are lacking:

(a) The appellant had no interest in the corporate assets neither did his contract and employment give him any and there was an entire lack of community interest in said assets.

(b) There is no agreement that appellant share in the losses as well as the profits.

(c) A joint venture is usually a contract between parties to carry out one transaction, whereas in the present instance, appellant was employed by a going corporation which had carried on business long prior to his employment and continued to do so after he left.

Under *Section 15007 of the Corporation Code* of the State of California relating to partnership, subdivision reads as follows:

"The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits are received in payment: (b) as wages by an employee or rent by a landlord."

There are many cases in this State which hold that the mere fact that a person receives a share of the profit

The corporation is not entitled to make him a partner
or joint venturer.

Revenue v. Jackson, 40 Cal. App. 298.

Stout v. Jackson, 40 Cal. App. 294.

Grady Carter and Jesse White Inc. v. England,
119 Cal. App. 747.

Poe v. McPhee Company, 31 Cal. App. 295.

The last named case holds on page 295 of said book a
contracting or joint enterprise is not formed where a cor-
poration engaged in the general contracting business, in-
curs a contract with an individual who is to construct
the construction of certain buildings for a percentage
of the "net profits."

Appellant therefore contends that he was only an em-
ployee of the building corporation with a fixed salary,
and a portion of which was guaranteed, and that the
agreement to give him a percentage of the net profits
which never came to pass, is not of such character
as to constitute him a joint venturer. The claim which

the subject matter of this matter is based solely on his
guaranteed salary. Furthermore, he was subject to dis-
charge, which certainly makes him an employee.

Conclusion.

It seems clear that the Transit Court acted in violation
of the Federal Labor Arbitration Act's general
rule to those of all other general relations in the case
of the facts submitted.

There has been no showing or even a suggestion in the
case of the Transit that the character of employment ex-
isted between the appellant and the building corpora-
tion was tainted with any fraud or dishonesty. Further

E. Appellant's Employment With the Bankrupt Corporation Did Not Constitute a Joint Venture.

The conclusions reached by the Referee in Paragraph IV, subdivision 4 of the Conclusions of Law [Tr. p. 32], *i. e.*, that the provisions of the employment contract whereby the appellant J. J. McDonell was to receive a percentage of the net profits constituted said appellant a joint venturer in the business of the bankrupt corporation, is not sustained by the facts and is contrary to the laws of this State. The following elements of a joint venture are lacking:

(a) The appellant had no interest in the corporate assets neither did his contract and employment give him any and there was an entire lack of community interest in said assets.

(b) There is no agreement that appellant share in the losses as well as the profits.

(c) A joint venture is usually a contract between parties to carry out one transaction, whereas in the present instance, appellant was employed by a going corporation which had carried on business long prior to his employment and continued to do so after he left.

Under *Section 15007 of the Corporation Code* of the State of California relating to partnership, subdivision 4 reads as follows:

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There are many cases in this State which hold that the mere fact that a person receives a share of the profits

his compensation is not sufficient to make him a partner or a joint venturer.

Freeman v. Sullivan, 86 Cal. App. 200;

Sievert v. Simmons, 89 Cal. App. 2d 34;

Kreng Copper and Brass Works Inc. v. England,
109 Cal. App. 747;

Fee v. McPhee Company, 31 Cal. App. 295.

The last named case holds at page 315 *et seq.*, that a partnership or joint enterprise is not formed where a corporation engaged in the general contracting business, enters into a contract with an individual who is to superintend the construction of certain buildings for a percentage of the "net profits."

Appellant, therefore, contends that he was only an employee of the bankrupt corporation with a fixed compensation, a portion of which was guaranteed, and that the agreement to give him a percentage of the net profits (which never came to pass) as part of said compensation, does not constitute him a joint venturer. The claim which is the subject matter of this matter is based solely on his guaranteed salary. Furthermore, he was subject to discharge, which certainly makes him an employee.

Conclusion.

It seems clear that the District Court erred in confirming the Referee's order subordinating appellant's general claims to those of all other general creditors in the face of the facts adduced.

There has been no showing or even a contention on the part of the Trustee that the contracts of employment entered into between the appellant and the bankrupt corporation were tainted with any fraud or unfairness. Further,

it has been shown, without denial or contradiction, that the amount of the salary agreed to be paid to appellant, was fair and reasonable in view of his experience and former earnings in the floor covering industry, and as such could not be unfair or inequitable to other creditors. The District Court erred in assuming that the appellant was an officer and director of the bankrupt corporation from the beginning of his employment to the time of bankruptcy, and did not give sufficient consideration to the fact that while appellant was a director and officer of the corporation for a few months, and also was asked to and did resign about eight months prior to the adjudication, he at no time was a stockholder nor did he have any financial interest in the bankrupt corporation; he was merely an employee. Therefore, there has been no legal showing made to support the Order of Subordination which wrongfully deprives appellant of the salary he earned and was entitled to for the services rendered by him to the corporation.

The appellant, therefore, urges that the Order appealed from, be reversed; that the Order of Subordination be set aside and that appellant be permitted to share pro-rata with all other general creditors of the bankrupt corporation.

Respectfully submitted,

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No. 12908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

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vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

Statement of Facts.

In the view taken by the Appellee of the instant appeal, as will appear more fully hereinafter, the problem is primarily one of an interpretation of facts. Appellant has set forth certain bare facts in his "Opening Brief" which Appellee wishes to accent and supplement as follows:

The Appellant, J. J. McDonell, a salesman of some years experience in the carpeting industry [Tr. p. 54], came to work for the bankrupt corporation in the first week of September, 1947 [Tr. p. 52]. The testimony given at the various hearings on this matter indicates, the Referee has so found [Tr. pp. 22-24], and the Appellee does not

dispute, that at that time there was an oral agreement between the Appellant J. J. McDonell and the bankrupt corporation, as represented by Raymond M. Hacker, that McDonell was to receive \$150.00 per week salary, plus 50% of the net profits of the carpet department, with a minimum guarantee of \$15,000.00 per year [Tr. pp. 53-54, 66-67]. The difference between the \$150.00 per week and the minimum to be paid at the end of a year [Tr. p. 67]. Thereafter, during the month of November 1947, Raymond M. Hacker bought out the other stockholder of the bankrupt corporation [Tr. p. 55]. Thereupon a number of meetings, both formal and informal, between Hacker, McDonell and other officers and directors of the bankrupt corporation were held [Tr. pp. 56, 145]. At that time the Appellant J. J. McDonell was made vice-president and general manager and a director of the bankrupt corporation [Tr. pp. 62-63]. Results of these meetings were a number of agreements between the corporation and various directors, officers and employees, materially increasing the salaries of these employees, and guaranteeing to them a substantial share of the profits [Tr. pp. 56, 59]. As far as the Appellant McDonell is concerned, the testimony shows, the Referee so found [Tr. pp. 22-24] and the Appellee herein does not dispute, that there was a contract whereby the Appellant McDonell was to receive, beginning January 1, 1948, a guaranteed salary of \$20,000.00 per year, payable \$150.00 per week beginning January 1, 1948, and the difference between the \$150.00 per week and \$20,000.00 to be paid at the end of the year

[Tr. pp. 55, 59, 67]. In addition the Appellant J. J. McDonell was to receive at the end of the year 15% of whatever profits were left over after the payment of any and all expenses of the bankrupt corporation, including the various guaranteed salaries then under discussion [Tr. pp. 55, 59, 90].

The Appellant, J. J. McDonell, continued in the employ of the Hacker-Byrnes Corporation until February 18, 1949, [Tr. p. 60]; and received at all times \$150.00 per week [Tr. pp. 67-70]. He never was paid any part of the balance between this \$150.00 per week and the "guaranteed salary" [Tr. pp. 60-61]; nor was the Appellant ever paid any sums under the foregoing percentage of profit arrangement. It is the discrepancy between his salary and the guaranteed amount which forms the basis of the claim of the Appellant in the amount of \$16,664.00 [Tr. pp. 17, 61].

The claims as filed in the bankruptcy by J. J. McDonell are two: a general unsecured claim for \$16,064.00 [Tr. p. 17] and a claim for \$600.00 which was asserted to be entitled to priority [Tr. p. 16]. The Findings and Conclusions and Order of the Referee disallowed any prior aspects of the claim of J. J. McDonell [Tr. pp. 32, 33] and it is Appellee's understanding that this claim of priority has been abandoned by the appellant McDonell. Consequently, as Appellee now understands the facts, Appellant J. J. McDonell is asserting a general unsecured claim for \$16,664.00. (An inspection of Appellant's Opening Brief on file in this matter indicates that this is the situation.)

Statement of Law.

I.

The Bankruptcy Courts are generally recognized as courts of equity, *Local Loan Company v. Hunt* 292 U. S. 234; *Reconstruction Finance Corporation v. Prudence Securities Advisory Group* (1941), 311 U. S. 579 (See concurring opinion); *Pepper v. Litton* (1939), 308 U. S. 295. And, sitting as such courts, it now seems generally conceded that the Bankruptcy Courts may subordinate payment of certain claims in the interest of justice and equity to other claims of the same rank, (See *Collier on Bankruptcy*, 14th Ed., Sec. 57.14.) As the rule is so admirably stated in *Pepper v. Litton*, cited *supra*, by Justice Douglas:

“In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate. And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director or stockholder.”

II.

In California the fiduciary position of officers and directors is declared by statute. By California Corporation Code Section 820:

“Directors and officers shall exercise their power in good faith and with a view to the interest of the corporation.”

See also Ballantyne on Corporations 1949 Ed. Sec. 84; *Western States Life Insurance Company v. Lockwood*, 173 Cal. 734; *Schnittger v. Oil Home Etc. Mining Company*, 144 Cal. 603. In bankruptcy the existence of this duty requires that claims of officers and directors be scrutinized with the greatest of care when asserted against the bankrupt corporation.

“A director is a fiduciary. *Twin Lock Oil Company v. Marbury* 91 U. S. 587, 588 * * * their powers are powers in trust. See *Jackson v. Ludling*, 21 Wall 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director—not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Giddes v. Anaconda Copper Mining Co.* 254 U. S. 590, 599. *The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.* While normally that fiduciary obligation is enforceable directly by the corporation * * * it is, in the event of bankruptcy of the corporation, enforceable by the trustee. (Citing Bankruptcy Act Sec. 70a (6) and *Dean v. Shingle* 198 Cal. 652.) For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.” Cited from *Pepper v. Litton* 308 U. S. 295, 298. (Emphasis supplied.)

III.

Appellee has inspected all the authorities cited by Appellant in his "Opening Brief" and cannot see that any of those authorities enunciate rules different from those immediately heretofore set down. Those authorities, taken with the others cited here, merely serve to emphasize that each case of subordination must be determined on its particular facts—that all circumstances must be considered when attempting to adjust the equities. The instant review is no different: Upon all the facts the Referee has held, and has been sustained upon review by the District Court, that it would be unjust and unfair to permit Appellant J. J. McDonell to participate equally with other general unsecured creditors in this case. The final determination, then, must rest upon a conclusion drawn from the facts as to whether or not the evidence before the Court was sufficient to justify the exercise of the undoubted equitable powers of subordination of the Bankruptcy Court.

QUESTION PRESENTED.

Granting That Appellant Has a Valid Unsecured Claim Against the Bankruptcy Estate in the Amount of \$16,664.00, Should That Claim Be Allowed to Participate on a Parity With the Allowed Claims of Other General Unsecured Creditors in This Case?

ARGUMENT.

I.

It Is Not Fair, Equitable or Just to Permit the Claim of Appellant to Share on a Parity With Other General Unsecured Creditors Because of the Fiduciary Relationship Appellant Occupied in the Bankrupt Corporation.

As has been indicated hereinbefore, in the view taken by Appellee the resolution of this appeal depends entirely upon the interpretation placed upon the testimony given before the Referee. The conclusion of law reached by the referee [Tr. pp. 30-32] sets forth in great detail the precise approach taken by the Referee, in which he was sustained by the District Court, in determining an answer to the question here presented. That finding is set forth here as a guide in determining this matter upon appeal because in appellee's view of this case this conclusion, and the reasons given by the Referee in support thereof, present the pivotal issue in this case:

“That each and all of the aforesaid enforceable contracts were not fair, equitable or just and are not fair, equitable or just, as against the creditors of the bankrupt corporation, for these reasons, among others, to-wit: (1) that from and after November 1947, the claimants, McDonell and Egan, were officers and directors of the bankrupt corporation and, as such, were charged with the responsibility of providing for the payment of all of the just obligations of the bankrupt corporation, which was not done for it appears that at the date of the termination of its business the cor-

poration was heavily indebted to its creditors and its liabilities were substantially in excess of its assets; (2) that the “guaranteed salaries” aforesaid were excessive and unreasonable in the light of the ability of the bankrupt corporation to pay the same and, at the same time, to discharge the obligations which it incurred while the said salaries were being earned; (3) that the rights given to the said claimants to participate in the profits, if any, of the bankrupt corporation and the postponement of the time of payment of a substantial portion of their respective “guaranteed salaries” to the rather indefinite time of the expiration of one year, gave the said claimants an unfair and inequitable advantage over the creditors of the bankrupt corporation in that, if the corporation prospered during the period of the aforesaid postponement, the claimants would collect their said salaries in full and, at the same time, would be entitled to their respective shares of the profits earned in such period; whereas, if, in such period, the corporation did not prosper and no profits were earned, the claimants would still be entitled to claim the unpaid portions of their respective salaries on a parity with all other creditors of the corporation, including the creditors to whom the corporation became indebted during the period of such postponement; and, furthermore, the said postponement of the time of payment of a portion of said “guaranteed salaries” resulted in the accumulation of liabilities by the corporation for the payment of such salaries during a period when it was unable to actually pay the same and thus the said postponement was a factor in keeping the corporation in business and in the incurring by it of further liabilities to creditors which it was eventually unable to pay; whereas, if the said “guaranteed salaries” had all been payable in normal

installments, the corporation, if it had been unable to pay the same when due, might have been compelled to discontinue its operations and might thus have avoided incurring the said further liabilities which eventually it was unable to pay; (4) that when one considers the substantial amounts of the aforesaid "guaranteed salaries" and the substantial percentages of the profits of the bankrupt corporation to which the said claimants were entitled, one is impressed with the idea that the relationship of each of the said claimants was more of the character of the relationship of a partner or a joint adventurer, rather than that of a profit sharing employee and, hence, that the said claimants, in equity, are not entitled to any greater rights, as against the creditors of the corporation, than partners or joint adventurers would have, even though the said claimants may have none of the liabilities to such creditors such as partners or joint adventurers might have."

It is proposed to examine each of the reasons the Referee advanced for subordination, and in which he was supported by the District Court, in the light of the evidence given in this case.

The evidence is uncontradicted that the Appellant J. J. McDonell, was at the time of the making of the contract to pay him \$20,000.00 a year "guaranteed salary," an officer and director of the bankrupt corporation [Tr. p. 63]. Nor can it be gainsaid that the bankrupt became in the year 1948 heavily involved financially, so heavily involved that an assignment for benefit of creditors was made March 21, 1949 followed by bankruptcy in April 1949 [Tr. pp. 5, 10]. At Bankruptcy there were large numbers of unsecured trade creditors with large claims whose indebtedness was contracted for during the year

1948 while the Appellant McDonell was an officer and director [Tr. p. 63]. The Referee, as indicated above, felt that it was not fair, equitable or just that the Appellant McDonell as an officer and director should sit by and perceive that the corporation was in financial difficulties, knowing that with the passage of every week a larger indebtedness accrued to him which did not appear upon the books and for which no reserve was being created [Tr. p. 76] and then at the end come forward with that claim and attempt to assert it on a parity with the other creditors in this matter.

It must always be kept in mind that during most of the period while the corporation sank deeper and deeper into financial difficulties, and while his deferred salary grew ever larger, the Appellant McDonell was an officer and director of the bankrupt corporation [Tr. p. 63]. Nor can he be permitted to contend, as extenuation, that he was the creature of Raymond Hacker the principle stock-holder; no one forced him to accept a position as an officer and director; he consented to be such freely, probably feeling it to be the proper station for one who was daily contributing a sizable sum to the operating capital by deferring the major portion of his income to some time in the future when the bankrupt might better be able to pay. Furthermore, the testimony of Hacker indicates [Tr. pp. 99-105] that McDonell and the other officers and directors were consulted as to the larger decisions affecting the Hacker-Byrnes Corporation: they were evidently not mere "yes-men" serving in a purely nominal way.

II.

It Is Not Fair, Equitable or Just to Permit the General Unsecured Claim of Appellant to Share on a Parity With Other General Unsecured Creditors Because the Uncollected "Guaranteed Salary" Which Is the Basis of Appellant's Claim Itself Contributed to the Large Amount of Debts Confronting This Bankrupt Estate.

The testimony of the Appellant McDonell indicates that he knew when he came to the Hacker-Byrnes Corporation in September 1947, that the carpet department which he had been hired to manage and develop was not capable of paying him the "guaranteed salary" of \$15,000.00 per year [Tr. pp. 53, 54, 68]. The testimony of McDonell on this point is most instructive. In response to questions concerning his original contract McDonell testified as follows [Tr. pp. 53, 54]:

A. (By McDonell) "He gave me a guarantee of \$15,000.00. When I went there Mr. Hacker didn't have very much of a rug department. He asked me for a year or two prior to that to come and work for him; and at the time that I went to work for him he didn't have any of the major carpet lines, and I felt, and I told him so at the time, that it wasn't going to be a deal where we could build up a business overnight, it was going to take a little time to build it; and he told me at that time he didn't expect to make any money for maybe a year or two, that he was willing to give me a guarantee of \$15,000.00 a year and a share of the profits of 50 per cent. Whatever the \$15,000.00 was, that was a guaranteed amount, whether we made any money in the rug department or not, and I didn't expect to make any the first year."

Likewise, according to the testimony of McDonell [Tr. p. 62] he knew shortly after becoming an officer and director, and about the time that the larger contract for the payment of a "guaranteed salary" of \$20,000.00 was under discussion, that finances were so tight and capital so short that it was difficult for the corporation to obtain merchandise.

"A. (By Mr. McDonell) The first month or the first few months—as I say, Mr. Hacker didn't have any of the major lines of carpet or anything. We didn't have anything much to sell. By the end of that year—I started in September. By the end of that year we had secured one contract on which there was about \$9,000.00 profit made. That was the second year I was there. *After Mr. Byrnes got out and after the first of the year finances were such, getting tighter all the time, that it made it almost impossible to get merchandise.*" (Emphasis supplied.)

The testimony of Edmund G. Egan taken at the same hearing [Tr. p. 91] indicates that all the officers and directors knew at the time of the making of the employment contracts, of which the appellant McDonell's was only one, that the corporation would be unable to immediately pay the large salaries promised.

"Q. (My McDonnell) Why wasn't the entire amount to be apportioned on the 52-week basis and paid at that time?

A. (By Edmund G. Egan) Because we didn't want to bleed the corporation of all the cash, you see, in it. We were trying to build up a new business."

The testimony of a number of witnesses at the hearing was to the effect that in May 1948 the Hacker-Byrnes Corp. was in sufficient straitened financial circum-

stances as to necessitate a sizable “across the board” reduction in the salaries of all principal employees including McDonell [Tr. p. 84]:

“Q. (By Mr. Gilbert): Now, Mr. Egan, there has been some uncertainty about the matter of the reduction of the salaries for \$150.00 a week in your case to \$100.00 a week, in May. Would you explain to the Court how that came about?

A. (By Mr. Egan): Well, I possibly was the one that recommended it, *that everybody should take a cut to help the corporation out over a period of time when we needed the money to possibly pay other bills with.*” (Emphasis supplied.)

“Q. Was it your intention in recommending that you were to receive any less on your basic salary, let us say—some people here have referred to it as a guaranteed salary—when you took that particular cut?

A. *No, that was just some immediate help to raise enough capital or lower our overhead enough so we could meet some bills that were pending at the time. We were doing such a large amount of work we needed a lot of capital at certain times to be able to meet our material bills.*” (Emphasis supplied.)

It is true that McDonell did not suffer by reason of the aforesaid cut in salary because the difference was made up to him secretly out of Raymond M. Hacker’s private funds [Tr. pp. 67-68].

In the face of such evidence, the appellee contends that the claimant McDonell would have had to be a blind optimist to suppose for even a moment that this corporation, struggling as it was to free itself from a mire of debt,

could hope to pay him at the end of a year, or any other time, the balance between \$150.00 per week and a \$20,000.00 a year guarantee. McDonell, as general manager, must have known the unreasonableness of his salary in view of all the circumstances.

The claim of Appellant cannot be considered in a vacuum: the contract with J. J. McDonell must be considered as part and parcel of a general optimistic plan to pay all the top executives of the Hacker-Byrnes Corporation large salaries, plus a sizeable percentage of the profits which one and all hoped would be made. In addition to McDonell, at the same time, Edmund J. Egan was promised a "guaranteed salary" of \$12,000.00 payable \$150.00 per week and the balance payable at the end of a year [Tr. pp. 80-84, 89-91]. Glen G. Savage, at or about the same time, was also promised a minimum salary of \$12,000.00 per year, payable \$150.00 per week and the balance at the end of the year [Tr. pp. 59, 90, 100]. Robert W. Schuler was likewise to receive a minimum salary of \$12,000.00 per year, payable \$150.00 per week and the balance at the end of a year [Tr. pp. 59, 90, 100]. Finally, Raymond M. Hacker was to draw a salary of \$25,000.00 per year, though the record is silent as to exactly how it was to be paid [Tr. pp. 59, 109]. Thus we see that "guaranteed salaries" to a total of \$81,000.00 per year were proposed for the top executives of a company which was at the time having difficulty meeting its current obligations. Merely to state the sanguine hopes in this case is to indicate that they were no more than just that: hopes impossible of immediate fulfilment by a corporation which may have had rosy promise, but certainly had little or no liquid capital with which to operate.

III.

It Is Not Fair, Equitable or Just to Permit the General Unsecured Claim of Appellant to Share on a Parity With Other General Unsecured Creditors Because Appellant's Claim Arises Out of Dealings Wherein Appellant Had Advantages Because of His Fiduciary Position Over Outside Creditors Who Dealt With the Bankrupt at Arms' Length.

In considering whether or not the claim of J. J. McDonell should be subordinated, the appellee submits that the following is a true and correct analysis of the result of the opulent employment contract between McDonell and the corporation: McDonell was given a stipend of \$150.00 per week. He left with the corporation the difference each week between \$150.00 and \$384.62, the weekly amount of his guaranteed salary, allowing this difference to accumulate to some distant date, when he hoped the corporation would be in a position to pay him the large sum of cash due him, which he knew could not be done as the corporation went along. In the meantime, of course, the accumulating fund was left with the corporation which was desperately short of liquid capital and enabled the corporation thus to have this additional margin for operation. At the same time, debts to outside creditors were being incurred and left unpaid. The Appellant McDonell was thus in a position of assisting the business to remain afloat, and incur more obligations which it was not paying, with the assurance that if and when the corporation was a success his money could be collected, together with a sizeable share of any net

profits. On the other hand, if the corporation was a failure, the appellant McDonell could then come forward, as he has done, with a large claim against the assets of the corporation which would stand on a parity with the other debts for which the conduct of the appellant McDonell and this employment contract were at least in part responsible. Considered in this light, can it be said that it would be fair for the appellant McDonell, who was for a considerable time an officer and director of the bankrupt corporation, to share equally with other creditors, the existence of whose debt could be traced in part to McDonell's contract? A contract, be it noted, which was entered into while McDonell occupied a fiduciary capacity *vis-a-vis* the corporation and its creditors. Appellee contends that such a consideration is abhorrent to the conscience of the court, that such Appellant has not "done equity" and that therefore under the equitable power of the Bankruptcy Court such a claim should be subordinated.

IV.

It Is Not Fair, Equitable or Just to Permit an Unsecured Claim of Appellant to Share on a Parity With Other General Unsecured Creditors Because Appellant Occupied a Position More Intimate With the Bankrupt Corporation Than That of a Mere Employee.

Before considering the last argument of appellee, a certain misapprehension under which the appellant McDonell seems to be laboring should be corrected. A sizeable portion of the "Opening Brief" of the Appellant on file herein is directed to a demonstration that under the California law appellant cannot possibly be a "joint venturer" and that therefore there is error in the Referee's Findings on this head [Tr. p. 32]. It is submitted that this argument entirely misconceives and misunderstands the Referee's Findings in this matter. The Findings of the Referee, which were sustained by this District Court, were in part as follows [Tr. p. 32]:

"* * * one is impressed with the idea that the relationship of each of the said claimants was *more of the character* of the relationship of a partner or a joint adventurer, rather than that of a profit sharing employee and, hence, that the said claimants, in equity, are not entitled to any greater rights, as against the creditors of the corporation, than partners or joint adventurers would have, *even though the said claimants may have none of the liabilities to such creditors such as partners or joint adventurers might have.*" (Emphasis supplied.)

As will be seen from this quotation, the Referee did not at any time declare that McDonell was a joint venturer

with the bankrupt corporation. There was not involved a question of liability and it is clear that the Referee had no intention of finding, nor did he find, that the appellant qualified technically as a joint venturer. What is involved here is a question of equity and the Referee in his Findings merely indicated that the conduct of the appellant, and other claimants who were substantially in the same position, was such as to be "more of the character of the relationship of a partner or joint venturer rather than that of a profit sharing employee." It is upon this basis that the matter should be considered and not in the distorted light which Appellant has cast upon it.

In connection with this Finding a very significant portion of the testimony of Edmund Egan should be kept in mind when attempting to evaluate the nature of the contract in this case. Consider the testimony given by Egan [Tr. p. 85]:

"Q. (By Mr. Gilbert): Mr. Egan, have you at any time had any financial or pecuniary interest in the corporation other than that as an employee?
A. (By Mr. Egan): No, I never did own stock. At the time—*there is something that hasn't come up*—at the time this agreement was made as far as profit-sharing was concerned, Mr. Hacker stipulated that until—let me put it this way: that *when and if the profits were to be split up by those percentages as we have set forth, as they were set forth, they were to be utilized or to be used in making us able to buy stock with the particular percentage of profit rather than taking it out in cash and bleeding the company.*" (Emphasis supplied.)

This testimony is uncontradicted—even on subsequent testimony by Appellant. Appellee submits that this testi-

mony reveals the true nature of the employment contracts between the bankrupt corporation, McDonell and the other executives of that corporation. Apparently there was some understanding on the part of the employees that these contracts would result in an ownership interest in the bankrupt corporation. That this hope never reached fruition is a circumstance dependent upon subsequent events (the failure of the bankrupt corporation) and not upon the nature of the contract itself.

Is this the usual profit sharing contract? The Appellee herein contends it is not, but, as the Referee has found, it is in equity a part of a large design whereby a number of men pooled their efforts and capital in the hope of future aggrandizement. Such persons, of which Appellant McDonell is one, should not be permitted to come forward upon the darkening of their hopes and demand to stand on a level with other creditors, who, dealing at arm's length, sold merchandise and loaned money to the bankrupt corporation.

Conclusion.

In summary, Appellee contends that in the interest of justice and equity the claim of Appellant J. J. McDonell should be subordinated to the payment of other general creditors in this bankruptcy estate because (1) The claim is asserted by one who was an officer and director charged with the fiduciary duty to see that insofar as possible the just obligations of the bankrupt were paid. Appellant occupied such a fiduciary position at the date the contract was made, for a number of months thereafter during which the large obligations now confronting this bankruptcy were accumulated, and at all times was the active general manager of the bankrupt corporation. (2)

And further because the "guaranteed salary" claimed by Appellant was excessive and unreasonable in the light of the bankrupt corporation's financial position, both when the contract was made and throughout the days ensuing to the date of bankruptcy herein. (3) And further because the "guaranteed salary" of the Appellant gives to him an unfair and unequitable advantage over those who dealt with the bankrupt corporation at arm's length. (4) Finally, an inspection of all circumstances surrounding the making and performance of this contract indicates that as a result of the said employment contract with the "guaranteed salary" attached that Appellant appears more in the role of a joint adventurer than that of a mere employee. As such he should be treated, in equity, as one closer to the bankrupt than were creditors dealing with it at arm's length.

For the reasons set out hereinabove the claim of Appellant should be subordinated to the payment of other general unsecured creditors in this bankruptcy matter and the order of the District Court sustaining the Order made by the Referee to this effect is correct and should be sustained.

Respectfully submitted,

FRANK C. WELLER,
HUBERT F. LAUGHARN,
THOMAS S. TOBIN,
C. E. H. McDONNELL,

By C. E. H. McDONNELL,

Attorneys for Appellee.

No. 12908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

BENJAMIN & KRONICK,

756 South Broadway,

Los Angeles 14, California,

Attorneys for Appellant.

SEP 19 1957

PAUL P. JENSEN,
CLERK



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No. 12908

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. J. McDONELL,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee of the Estate of Hacker-
Byrnes Corporation, bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Introductory Statement.

In his Reply Brief, the Appellee has misconceived the duty of the bankruptcy court on hearings to disallow or subordinate claims of the officers or directors of a corporation for salaries. He has cited only one case which has any bearing in this connection, *Pepper v. Litton*, 308 U. S. 295. The other authorities have nothing whatsoever to do with this problem and go only to the jurisdiction and power of the Court, which appellant concedes. Appellee assumes that under no circumstances, may an officer or director recover salary against the bankrupt corporation, which is wholly fallacious. The instant brief will expose these fallacious contentions, which the Appellee finds he must urge to support the erroneous decision of the District Court.

II.

Summary of the Argument.

A. The Appellee wholly disregards the fact that the Appellant came to the bankrupt corporation as a stranger and purely as an employee, without any financial interest whatsoever therein.

B. The Appellee wholly disregards the fact that Appellant was not an officer or director of the bankrupt corporation for more than six months prior to its insolvency and makes statements of the financial condition of the corporation during the time of his directorship, which is wholly unsupported by any evidence in the transcript.

C. The Appellee wholly disregards the fact that the salary agreed to be paid to the Appellant was fair and reasonable.

III.
ARGUMENT.

A. The Appellee Wholly Disregards the Fact That the Appellant Came to the Bankrupt Corporation as a Stranger and Purely as an Employee, Without Any Financial Interest Whatsoever Therein.

The Appellee finds no fault with the decision in the case of *Pepper v. Litton, supra*, which apparently the Appellee wholly relies on by citing large portions thereof. However, it is curious to note that he has not cited any facts upon which said case is based. This case arose out of a claim made by the dominant stockholder of a corporation for back wages, which claim was a "planned and fraudulent scheme" and was disallowed entirely by the court. We wish to emphasize this because in the present case, the contract was found to be legal and enforceable, but payment thereof was subordinated to other creditors.

Appellant maintains that the aforesaid case supports our contention and as it states: "the essence of the test is whether or not under all the circumstances, the transaction carried the earmarks of an arms-length bargain." Did not this appellant come to the bankrupt corporation and deal with it at arms-length? We cannot conceive how Appellee can argue that he did not. The undisputed facts are that he was a stranger who was employed by the bankrupt corporation at a designated salary. Does Appellee maintain that this is fraudulent and that a prospective employee must look into the financial affairs of a

corporation before he becomes employed by it, to ascertain whether or not it can pay the salary, as a pre-requisite to enforcing a claim for wages thereafter, if the same is not paid?

Appellee has also entirely disregarded the fact that there was no fraud involved in the making of the employment contracts in question. In this connection, Appellee also disregards the case: *In re American Range and Foundry*, 22 F. 2d 558, the facts of which, insofar as any fiduciary relationship are concerned, are much stronger than in the present case, for the reason that it involved a claim for wages on a contract for services by a director, who, with his son, were the sole stockholders of the corporation. The claim was upheld and approved by the court. Appellee has made no answer to this case, while quoting generally the law of fiduciary relationship. We have pointed out in our Opening Brief, that the Appellant had no financial interest in the bankrupt corporation and that he was purely a "dummy" director, which is answered by Appellee at page 10 of his Reply Brief, with the absurd argument that "no one forced him to accept the position as an officer or director." The undisputed evidence is that he was merely appointed by Raymond Hacker, the sole owner of the corporation.

B. The Appellee Wholly Disregards the Fact That Appellant Was Not an Officer or Director of the Bankrupt Corporation for More Than Six Months Prior to Its Insolvency and Makes Statements of the Financial Condition of the Corporation During the Time of His Directorship, Which Is Wholly Unsupported by Any Evidence in the Transcript.

There was no testimony at the time of the hearing on this claim, that the bankrupt corporation was insolvent during the time the Appellant was an officer or director thereof. There is no mention of insolvency in the transcript. It appears that the corporation was operating with a shortage of working capital during said times; this is a far cry from insolvency. From such a situation, it is certainly illogical to even imply insolvency. Furthermore, in any event, there is nothing in this situation which could in any manner even create an implication that any action or conduct on the part of the Appellant contributed to the bankruptcy of this corporation. If the Trustee, the Appellee herein, would be fair in this matter, he would advise the Court that the bankruptcy was caused by the withdrawal of capital and inventory by the new parties who came into the corporation in the middle of 1948.

In Argument I of his Reply Brief, commencing at page 7, Appellee has quoted, *haec verba*, the Conclusions of Law which are set forth in the transcript [Tr. pp. 30-32]. We reiterate that from a reading of them, it cannot be conceived how or in what manner they are conclusions of law, as the same are based wholly upon a supposition that if certain things had been done during 1948, other things might have happened.

C. The Appellee Wholly Disregards the Fact That the Salary Agreed to Be Paid to the Appellant Was Fair and Reasonable.

That nowhere in Appellee's Reply Brief, is there any statement or argument that the guaranteed salary agreed to be paid to Appellant was not a fair and reasonable salary. He endeavors, by argument at page 14 of his Reply Brief, to designate the payment of such salary, "an optimistic plan" and entirely ignores the fact that new capital was supposed to have been brought into the corporation by Messrs. Sommers, Boyer and Kaplan [Tr. p. 71] and that these parties insisted in the middle of 1948 that he stay on, when he attempted to resign, which certainly prevented him from going out and earning a salary which he was entitled to, considering his experience.

The Appellee endeavors to becloud the issue here by setting up in Argument III of his Reply Brief, commencing at page 11, a description of salaries agreed to be paid to other employees. This is wholly irrelevant because we are not concerned with what other employees were agreed to be paid. Appellee has failed to advise the court that these other employees had been with the bankrupt corporation for long periods of time at certain fixed salaries, whereas, the Appellant only came to the corporation as a stranger late in 1947 with 25 years of experience and background in the floor covering business, where he had earned a salary equal to that agreed to be paid to him by the bankrupt corporation. As we have stated in our Opening Brief, just because the corporation was unsuccessful, is no reason for penalizing an officer

or director by subordinating his claim to those of other creditors.

Barlow v. Budge, 127 F. 2d 440.

Appellee has also made no reply to the statement of law contained in this case.

IV.

Conclusion.

From a reading of the Statements of Fact set up by both the Appellant and Appellee, the Court can conclude that there is no apparent disagreement of the parties as to the facts in this case. The doctrine advanced by the Appellee is untenable for the reason that if it were the law, no director or officer could ever recover back salary from a bankrupt corporation. This is clearly not the holding in all of the authorities cited by both parties. The result of the order appealed from is not only harsh, but the order itself is a violation of clear and positive rules of law, which should be properly applied to the undisputed facts in this case.

The Order appealed from should be reversed.

Respectfully submitted,

BENJAMIN & KRONICK,

By ROBERT I. KRONICK,

Attorneys for Appellant.

No. 12922

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM C. McINDOE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.



No. 12922

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM C. McINDOE,

Appellant,

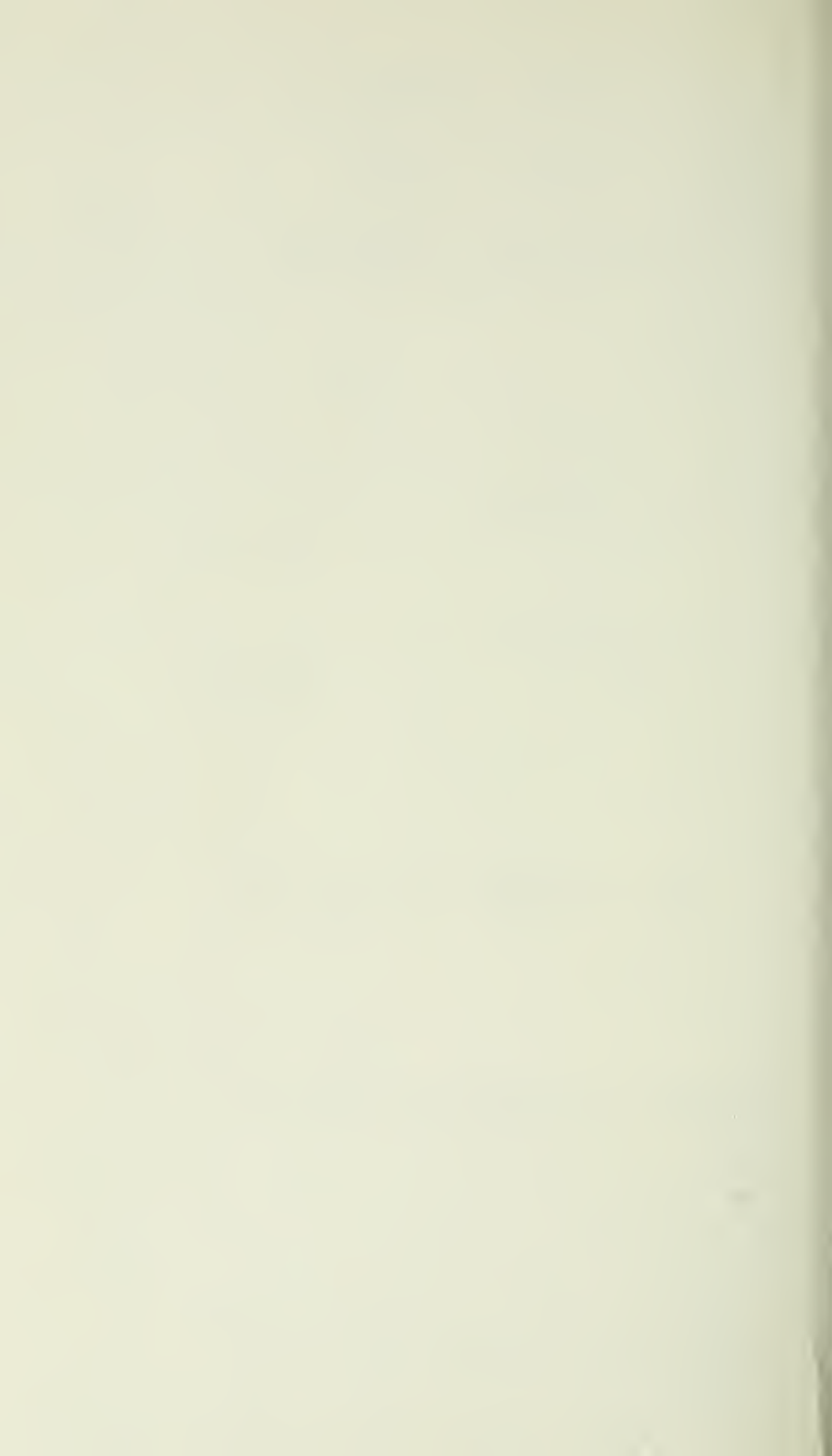
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
For the District of Oregon

Civil No. 5698

WILLIAM C. McINDOE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PRE-TRIAL ORDER

Preliminary Statement

This is an action against the United States of America by the beneficiary of a National Service Life Insurance Policy upon which the Veterans Administration refused payment on the ground that premiums were not paid to the date of death. During his lifetime the insured wrote to the Veterans Administration and was advised that he had a credit on deposit equivalent to nearly four monthly premium payments and that said credit could be applied to the payment of future premiums. The insured thereafter paid no monthly premiums and within a few months was killed in a mountain climbing accident in Wyoming. Plaintiff, the insured's father, knew that the insured did not intend to abandon his policy although he had been late in one or two payments. On a claim for payment of the policy being presented, the Veterans Administration reneged on its letter of credit, claiming that the letter was in fact in error and that there was no credit whatsoever available and refused pay-

ment of the policy. The Government takes the position that, admitting that there would be an estoppel against a private insurance carrier sufficient to allow payment of the policy, no estoppel can be urged against the Government.

Statement of Agreed Facts

1. That this Court has jurisdiction of this cause under Section 817, Title 38, U.S.C.A.; that plaintiff resides in Portland, Multnomah County, Oregon; that plaintiff's claim is an action for the payment of a policy of National Service Life Insurance; that said policy was executed and that a certificate in proof thereof was delivered, Number N 14769414, effective September 28, 1943, and was supported by valuable consideration; that the insured died August 24, 1947; that the defendant at all times acted by and through the Veterans Administration, its officers, agents, servants and employees.

2. That the policy named as primary beneficiary Mrs. Irena C. McIndoe, the insured's grandmother; that she deceased August 12, 1948; that plaintiff herein was named as secondary or contingent beneficiary and is the present beneficiary under said policy.

3. That on or about June 2, 1949, plaintiff submitted his claim in writing for the payment of the death benefits under the policy; that the defendant denied said claim on the ground of the non-payment of one monthly premium; that plaintiff duly and regularly appealed to the Board of Veterans Appeals, Washington, D. C., and that said

Board, on the same ground, denied said claim on January 12, 1950; that plaintiff has exhausted his administrative remedies.

4. That a disagreement exists between plaintiff and defendant; that said disagreement concerns only the payment of one monthly premium; that premium payments were made by allotment from the insured's service pay through May 28, 1946, following the insured's honorable discharge from active military service April 26, 1946; that defendant, by administrative action, waived the nonpayment of two monthly premiums, to wit: the months of November, 1946, and February, 1947; that other monthly payments were made by plaintiff and were received and credited by the defendant as follows:

Premium Due Date	Date of Payment
6-28-46	5-18-46
7-28-46	7- 3-46
8-28-46	8- 1-46
9-28-46	10- 9-46
10-28-46	11-19-46
11-28-46	Waived
12-28-46	1-17-47
1-28-47	1-17-47
2-28-47	Waived
3-28-47	4-11-47
4-28-47	4-11-47
5-28-47	5- 1-47

that a thirty-one day grace period existed, keeping the policy in force thirty-one days after the last premium payment.

5. That on or about May 13, 1947, the insured directed a letter, which was to the defendant, which the defendant received on or about that date, a true copy of which is hereto attached, marked "Exhibit A," and by reference thereto incorporated herein; that the defendant answered said letter by letter dated on or about May 29, 1947, a copy of which is hereto attached, marked "Exhibit B," and herein incorporated by reference thereto.

6. That the insured during his lifetime made no election as to the method of receiving benefits under said policy, and that the plaintiff herein has elected to receive payments in the shortest manner, to wit: thirty-six monthly payments from August, 1947.

7. That the plaintiff has retained James Cole and Bartlett F. Cole as his attorneys to represent him in this action.

Issues To Be Determined

1. Did the insured during his lifetime accept, rely upon and act upon the defendant's statement of credit in the defendant's letter, which is Exhibit "B" herein, by himself discontinuing further cash monthly premium payments.

2. Is the defendant estopped by its letter, which is Exhibit "B" herein, to assert that one monthly premium payment has not been made.

Question of Law

1. Will an estoppel lie against the United States, acting by and through the Veterans Administration, on a policy of National Service Life Insurance.

Exhibits

The following exhibits have been identified and their authenticity admitted. All questions as to their relevancy, materiality, competency and admissibility are reserved by each of the parties until trial.

1. Exhibit "A."

2. Exhibit "B."

(It is stipulated that the copies of the originals hereto attached may be used in lieu of said originals.)

3. Exhibit "C"—Bulletin.

4. Exhibit "D"—Application for reinstatement.

It is Hereby Ordered that the foregoing constitutes the Pre-trial Order in the above-entitled cause and the foregoing Order supersedes the pleadings and said Pre-Trial Order shall not be amended in the trial except by consent or by the Order of the Court to prevent manifest injustice.

Dated this 10th day of November, 1950.

/s/ GUS J. SOLOMON,

Judge.

The foregoing Pre-Trial Order has been prepared and assented to by us:

/s/ BARTLETT F. COLE,

Of Attorneys for Plaintiff.

/s/ JOHN R. BROOKE,

Assistant United States Attorney, of Attorneys for Defendant.

Exhibit A

Veterans Administration
Branch No. Eleven
Exchange Bldg.
Seattle, Washington

Gentlemen:

Inclosed is remittance in the amount of \$6.50 payment of the premium due for April on National Service N-14-769-414 on the life of William C. McIndoe, Jr., ASN 19201354.

As I was not able to make one or two payments on time I have gotten a few of my payments in late and now I am not sure for which month I am delinquent for. I would appreciate it very much if you would let me know just where I stand. Thank you.

/s/ WILLIAM C. McINDOE, JR.,
Reed College,
Portland 2, Ore.

Exhibit B

Veterans Administration
District Office No. 12
San Francisco, California

May 29, 1947

Mr. William C. McIndoe, Jr.
Reed College
Portland 2, Oregon

Dear Mr. McIndoe:

Reference is made to your correspondence regarding National Service Life Insurance.

The records indicate that premiums on your insurance have been paid as shown in column (3) below. If no remittance was tendered for the premium due on July 28, 1946, or within 31 days thereafter, the insurance lapsed.

- (1) Certificate Number N 14 769 414.
- (2) Monthly Premium \$6.50.
- (3) Premiums Paid Through 7-27-1946.
- (4) Date of Lapse 7-28-1946.
- (5) Credit \$25.90.

Form 9-37, "Application for Reinstatement of National Service Life Insurance," is enclosed and should be completed in accordance with instructions thereon. The credit shown under Column (5) above may be used for the amount required for reinstatement and the excess may be applied to later premium payments.

The remittance enclosed in your recent letter when identified with your account will also be held as a credit to your account.

Very truly yours,

D. O. NELSON,
Director, Insurance Service.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled action came on for trial before the above-entitled court without a jury on the 10th

Exhibit A

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Seattle, Washington

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Very truly yours,

D. O. NELSON,

Director, Insurance Service.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled action came on for trial before the above-entitled court without a jury on the 10th

day of November, 1950, plaintiff appearing by Bartlett Cole, his attorney, and defendant appearing by John R. Brooke, Assistant United States Attorney for the District of Oregon. At the conclusion of the trial briefs were submitted by each party through their respective attorneys on a legal point raised during the course of the trial. The Court having considered the evidence adduced at the trial and legal arguments raised in the briefs, and being fully advised in the premises, now makes the following

Findings of Fact

I.

That plaintiff, William C. McIndoe, is the present beneficiary under a certain National Service Life Insurance policy issued on the life of his son, William C. McIndoe, Jr., which became effective September 28, 1943. This policy was in the amount of \$10,000.00 and was identified by Certificate Number N 14 769 414.

II.

That William C. McIndoe, Jr., died on August 24, 1947.

III.

That the last monthly premium payment made on this insurance policy occurred on May 1, 1947, this payment being the premium due for the period May 28, 1947, to June 27, 1947.

IV.

That the National Service Life Insurance policy

involved in this case provided for a thirty-one day grace period upon non-payment of premiums when due.

V.

That the above-described insurance policy was in effect (including the thirty-one day grace period) until July 29, 1947.

Based on the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That this court has jurisdiction over the parties and the subject matter.

II.

That the insurance policy involved in this cause lapsed by reason of non-payment of monthly premiums when due prior to August 24, 1947, and was not in force and effect on that date.

III.

That defendant herein, United States of America, may not be estopped to raise the defense of non-payment of premiums on a National Service Life Insurance policy.

IV.

That plaintiff is not entitled to recover from the defendant in this action, and defendant is entitled to judgment.

Dated at Portland, Oregon, this 16th day of March, 1951.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed March 16, 1951.

In the United States District Court
For the District of Oregon
Civil No. 5698

WILLIAM C. McINDOE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This matter having come on for trial before the Court without a jury on the 10th day of November, 1950, and the Court having entered its Findings of Fact and Conclusions of Law in favor of defendant, and the Court being fully advised in the premises, therefore, it is

Ordered, Adjudged and Decreed that plaintiff take nothing and that the above-entitled action be, and it is hereby dismissed on the merits.

Made and entered this 16th day of March, 1951.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed March 16, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America, Defendant, and
Henry L. Hess, United States Attorney; John
R. Brooke, Deputy United States Attorney,
District of Oregon, United States Court House,
Portland 7, Oregon.

Notice is Hereby Given that William C. McIndoe,
plaintiff above named, hereby appeals to The United
States Court of Appeals for the Ninth Circuit from
the final judgment that plaintiff take nothing in the
above-entitled action and dismissing it on the merits,
said judgment entered in this action on March 16,
1951.

/s/ JAMES COLE,

/s/ BARTLETT F. COLE,

Attorneys for Plaintiff and Appellant William C.
McIndoe.

Due and legal service of the foregoing Notice of
Appeal is hereby accepted in Portland, Oregon, this
7th day of May, 1951.

By /s/ JOHN R. BROOKE,

United States Attorney.

[Endorsed]: Filed May 7, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To: Lowell Mundorff, Clerk of the United States
District Court, for the District of Oregon,
United States Court House, Portland 7, Oregon.

Comes now Wiliam C. McIndoe, plaintiff and appellant above named, acting by and through his attorneys of record, and designates that the following be included in the record on appeal to The United States Court of Appeals for the Ninth Circuit:

1. Pre-Trial Order.
2. Findings of Fact and Conclusions of Law.
3. Judgment.
4. Official Court Reporter's Transcript of Court Proceedings, prepared and certified by Ira G. Holcomb, Official Court Reporter. This transcript includes the oral opinion rendered on February 17, 1951, by Gus J. Solomon, District Judge.
5. All of the Exhibits in the case:
 - (a) Letter from the insured to Veterans Administration;
 - (b) Letter from the Veterans Administration to insured, dated May 29, 1947;
 - (c) Veterans Administration Technical Bulletin;
 - (d) Veterans Administration Application for Reinstatement Form. Your attention is

called to the fact that plaintiff and defendant have stipulated in the Pre-Trial Order that copies of the first two might be used in lieu of the originals and that the copies were attached to the Pre-Trial Order.

6. Notice of Appeal.
7. Designation of Contents of Record on Appeal.
8. Transcript of Docket Entries.

Dated at Portland, Oregon, this 7th day of May, 1951.

/s/ JAMES COLE,

/s/ BARTLETT F. COLE,

Attorneys for Plaintiff and Appellant William C. McIndoe.

Due and legal service of the foregoing Designation of Contents of Record on Appeal is hereby accepted in Portland, Oregon, this 7th day of May, 1951.

By /s/ JOHN R. BROOKE,

United States Attorney.

[Endorsed]: Filed May 7, 1951.

[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES

1950

July 20—Filed complaint.

July 20—Issued summons—to Marshal.

July 21—Filed summons with Marshal's return.

1950

- Aug. 21—Entered order setting for pre-trial conference on October 9, 1950, and assigning to J. McColloch.
- Sept. 5—Entered order assigning to Judge Solomon.
- Sept. 11—Entered order resetting for pre-trial conference Nov. 6, 1950, with trial to follow.
- Sept. 16—Filed stipulation that deft. have to and inc. Oct. 6, 1950, in which to appear.
- Sept. 18—Filed and entered order that deft. have to and inc. Oct. 6, 1950, in which to appear.
- Oct. 9—Filed answer.
- Nov. 6—Entered order setting for trial on Nov. 10 at 9:00 a.m.
- Nov. 10—Record of pre-trial conference.
- Nov. 10—Filed and entered pre-trial order.
- Nov. 10—Record of trial before court and order taking under advisement.

1951

- Feb. 13—Filed plaintiff's second brief of authorities.
- Feb. 17—Record of opinion and order for defendant to prepare and submit Findings of Fact, Conclusions of Law, and Judgment.
- Mar. 16—Filed and entered Findings of Fact and Conclusions of Law.
- Mar. 16—Filed and entered judgment for defendant.
- Mar. 20—Filed cost bill of defendant.
- Mar. 23—Filed praecipe of U. S. for certified copy of findings and judgment. Issued 3-23-51.
- May 7—Filed transcript of proceedings of Nov. 10, 1950, in duplicate.

1951

- May 7—Filed notice of appeal by plntf.
May 7—Filed bond for costs on appeal.
May 7—Filed designation of record on appeal.
May 7—Mailed copy of notice of appeal to U. S.
Atty., c/o John R. Brooke.
-

United States District Court
District of Oregon
Civil No. 5698

WILLIAM C. McINDOE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

November 10, 1950

Before: Honorable Gus J. Solomon,
Judge.

Appearances:

MR. BARTLETT F. COLE,
Attorney for Plaintiff.

MR. HENRY L. HESS,
United States Attorney, by

MR. JOHN R. BROOKE,
Assistant United States Attorney, and

MR. DONALD W. McEWEN,
Assistant United States Attorney.

TRANSCRIPT OF PROCEEDINGS

The Court: Have you agreed upon this pre-trial order that has been submitted?

Mr. Brooke: I believe the pre-trial order has been signed and agreed upon and presented to the Court, your Honor.

Mr. Cole: Your Honor, when this was brought up, there was a Technical Bulletin issued by the Veterans Administration which opposing counsel and myself studied, and we thought we might include it as one of the exhibits, and then when the pre-trial order was presented we decided we did not want to do that. I would rather like to have it included, your Honor. However, Counsel tells me that an officer of the Veterans Administration will be here, and perhaps his testimony will bring out the same facts.

Mr. Brooke: That is correct, your Honor. The bulletin is rather complex. I have examined it and Mr. Cole has examined it. Both of us have been of the opinion that, without some background in the matter, we would not be able to make a proper interpretation of it.

The Court: That would not make any difference if he wants to use it.

Mr. Brooke: If he desires to use it, that is all right, if the witness will clarify any misunderstandings that might be developed.

The Court: It may be marked as Exhibit C.

(Veterans Administration Technical Bulletin, TB9-53, was thereupon marked Plaintiff's Exhibit C.)

Mr. Cole: Thank you, your Honor.

Mr. Brooke: I would also like to add a certain document which was enclosed with a letter returned by the Veterans Administration to the insured in this particular case. That is the [2*] application for reinstatement which was enclosed in the letter received by the insured in this case.

The Court: Have it marked Exhibit D.

(Blank form of application for Reinstatement (Non-Medical) was thereupon marked Defendant's Exhibit D.)

The Court: Is there any other change?

Mr. Brooke: That is all.

Mr. Cole: No, your Honor, that is all.

The Court: I am going to sign the pre-trial order. Call your witness Mr. Cole.

Mr. Cole: Your Honor, I have prepared a preliminary brief, if I might tender it at this time.

The Court: Yes.

Mr. Cole: The plaintiff will call Mr. McIndoe, the plaintiff himself.

WILLIAM C. McINDOE

plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cole:

Q. Mr. McIndoe, your address, please?

A. 119 Northwest 21st Avenue, Portland, Oregon. [3]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William C. McIndoe.)

Q. Your occupation at this time?

A. Consulting industrial chemist.

Q. How old are you? A. Fifty-five.

Q. Are you the father of William C. McIndoe, Jr.? A. I am.

Q. Were you, yourself, a serviceman in World War I? A. Yes.

Q. And in World War II? A. Also.

Q. Did you keep up your Government insurance policy issued in World War I? A. I did.

Q. What was the general nature of your son's World War II service?

A. His service began in 1943 when he was called from Reed College into the service. He got some additional training at the University of Illinois and was transferred to the Corps of Engineers and went into battle with General Patton up in Germany with the 1265th Engineer Battalion as a Staff Sergeant in Company D, when he was only twenty years old.

Q. When did he die?

A. August 24, 1947.

Q. How old was he then?

A. Twenty-two.

Q. When was he discharged from the [4] service?

A. In April of 1946.

Q. In the fall of 1946 where was he living?

A. He came back in the fall to first live with me and then he went over to Reed College where he maintained a dormitory room, so as to be close to his work at the College.

(Testimony of William C. McIndoe.)

Q. Did he visit you on week ends?

A. Yes, and often during the week.

Q. And stayed overnight at your home sometimes on week ends?

A. That is right; that is not at that address at the time, however.

Q. At what address were you living then?

A. 3430 Southwest Scholls Ferry Road.

Q. Did these visitations occur during the following winter and the spring of the year, 1946 and 1947?

A. That is correct.

Q. At that time was the subject of the National Service Life Insurance discussed?

A. It was, on several occasions.

Q. Who was present besides yourself and your son?

A. My wife.

Q. What, if anything, was said by your son in respect to the continuation of the National Service Life?

Mr. Brooke: I object to that, your Honor, on the ground of hearsay and as not being properly admissible in this case. If anything was said by the plaintiff, undoubtedly it would be to [5] his interest rather than against his interest. I believe it is all inadmissible.

The Court: I am going to overrule the objection and listen to the evidence.

The Witness: Mr. Cole, repeat your question then.

Q. (By Mr. Cole): What, if anything, did your

(Testimony of William C. McIndoe.)

son say about continuing his National Service Life Insurance?

A. He was feeling very strongly about the limited amount of money that he had under the GI Bill of Rights and was finding it difficult.

In the discussions both my wife and I tried to tell him of the advantages of continuing the insurance, using my own particular case as an example as to how my own insurance had helped me from time to time, and with the help of a Terminal Leave bond he finally decided, yes, he could go on and continue his insurance.

Q. He was going to school under the GI Bill?

A. That is correct.

Q. Receiving certain payments going towards his board and room?

A. That is correct.

Q. Was he also receiving any other income from the Government?

A. He had a minor disability allowance which, I think, amounted to about \$15 a month, due to frostbite of his feet.

Q. Was there any delay in receiving those payments from the Government? [6]

A. Yes. Around October of 1946 the Veterans Administration discontinued his payments entirely until he could clarify his——

Mr. McEwen: I do not think that is competent, your Honor.

The Court: I doubt the competency of some of this evidence but, as I stated, in view of the fact there is no jury here, I will be able to sit it out.

(Testimony of William C. McIndoe.)

Mr. Brooke: Could the record show, your Honor, that statements made by the deceased to various witnesses go in over our objection?

The Court: Yes. This is all being admitted subject to the Government's objection.

Q. (By Mr. Cole): Did your son ever appeal to you for financial assistance in maintaining his National Service Life Insurance? A. Yes.

Q. On what occasion was this?

A. Around the period of October, and I furnished him money for his premiums.

Q. What was his monthly premium?

A. \$6.50.

Q. What items did he mention, if he mentioned any, as reasons for continuing his National Service Life Insurance?

A. The items mentioned were that, due to his allotment, he had quite a bit of money invested in the policy that he would lose if he dropped it.

Mr. Brooke: I didn't hear the first. [7]

A. My son said that he had quite a bit of money invested in the policy, due to his allotment, which he would lose if he dropped it, and in the course of these discussions I realized——

Q. (By Mr. Cole): What did he say? What did he say, for example, about the use of the insurance, if he said anything, as security for a loan?

A. Well, he said he was convinced that it had a value because he had seen it or knew of it having a value for me personally on my own insurance.

(Testimony of William C. McIndoe.)

Q. Did he discuss the advantages of conversion?

A. Yes, he did. He knew from the type of insurance that he started with that it could only run five years and then he had to convert it, so he was starting to think about what type of insurance he would convert to.

Q. It was term insurance that he had?

A. He only had term insurance; that is right. They all started that way. I started that way.

Q. What plan, if any, did he discuss as a plan that he intended to convert to?

A. We took the bulletin published by the National Service Life and studied every single plan and finally wound up with a decision—or he wound up with a decision to use the 30-Pay-Life, and to take his Terminal Leave bond to pay the difference.

Q. What did your son do in the spring of 1947, if anything, in the way of a vocation after leaving school? [8]

A. He put in an application for summer work, for a summer job, with the National Park Service, because a couple of his bosom pals at Reed were planning to do the same thing, and one in particular already had his job over there as a ranger established.

Q. Approximately when did he end his semester at Reed in 1947, in the spring?

A. I don't quite get your question.

Q. Do you know the approximate date that the spring semester closed at Reed in 1947?

(Testimony of William C. McIndoe.)

A. The first week in June.

Q. Did he leave for this Wyoming job directly from Portland?

A. No, he went south, first, to California.

Q. Did he leave as soon as school was out in the spring of 1947?

A. He stayed in Portland only long enough to close his bank account.

Q. Do you know the date on which he closed his bank account?

A. To the best of my recollection, it was June 6th, at the main branch of the First National Bank.

Q. Did you ever see him alive again after he left Portland? A. Never.

Q. During the few days before he left for Wyoming did he discuss with you his National Service Life Insurance policy?

A. Yes, he did.

Q. Did he discuss with you, in particular, the payments for the ensuing summer, the monthly premium payments? [9] A. Yes, he did.

Q. What, if anything, did he say in that connection?

Mr. Brooke: That is specifically objected to by the Government, your Honor.

The Court: Your objection may go to that, but he may answer the question.

Q. (By Mr. Cole): Go ahead and answer the question.

A. His statement was in reply to an offer of mine to take care of his premium payments while

(Testimony of William C. McIndoe.)

he was away in the summer months. He said that would not be necessary because he had a credit which would take care of them.

Q. Do you know when registration commenced in the fall of 1947 at Reed College? A. Yes.

Q. What date was that?

A. September 22, 1947.

Q. If it had not been for your son's untimely death, would he have come back to Reed, as far as you know? A. That is correct.

Q. Do you know whether, at the time of his death in Wyoming, he had any money on his person or not?

A. I know what was handed to me when I went over there for the funeral.

Q. Was there any cash money handed to you?

A. \$140. [10]

Q. Were you told that was on his person at the time of his death? A. That is correct.

Q. Did he give you any instructions as to the use of the Terminal Leave bond before he left?

Mr. Brooke: That is immaterial, your Honor.

The Court: Objection overruled.

A. He gave me instructions to keep custody of them until he could return in the fall.

Q. (By Mr. Cole): What plan did he express, if any, for the use of the Terminal Leave bond in the fall?

A. The plan that he stressed was to use that bond in the conversion of his insurance policy to pay the difference between his term insurance and

(Testimony of William C. McIndoe.)

the higher cost of the 30-Pay-Life to establish his initial low age for the final policy.

Mr. McEwen: Your Honor understands the Government has an objection to this line of inquiry. We would not want to reiterate the objection. I do not see that it serves any material purpose if the Court will reserve ruling.

The Court: Yes. When I say "objection overruled" that means taking it under advisement. I might say that goes to the whole line of questions. I have some doubt as to the admissibility of a great deal of this testimony, but I thought I would permit the witness to answer these questions and later on I will make a determination. [11]

Q. (By Mr. Cole): Mc. McIndoe, how did your son meet his death?

A. By a fall from the 11,000-foot level of Mt. Owen in the Grand Teton Mountains.

Q. This document which has been marked Exhibit B in the pre-trial order, did you ever see that personally?

A. I never saw the original that I know of.

Mr. Cole: I think that is all.

Cross-Examination

By Mr. Brooke:

Q. I believe you testified, Mr. McIndoe, that your son closed his bank account on June 6 of 1947?

A. To the best of my belief, yes.

Q. Do you know if there was any reason for that? Did he tell you why?

(Testimony of William C. McIndoe.)

A. He said that he was extremely short of cash.

Q. Did he ever discuss his financial condition with you?

A. Yes, to a certain extent, but he was very proud; tried to get by on what he had.

Q. Did he tend to watch his money fairly closely?

A. I believe he turned in a very good account of the money in his possession.

Q. You understood the policy that your son had was a term insurance policy, did you not?

A. Yes, I did. [12]

Q. Didn't you also know that a term insurance policy does not build up any cash surrender value or loan value; that all it is is coverage or protection for a certain period if the payments are met?

A. That I didn't know.

Q. You didn't know that?

A. I didn't know that, no.

Q. Did you discuss with your son how he proposed to make these very increased payments on his converted plan of insurance if he had limited funds at the time he planned to convert?

A. Yes, we did discuss that and, so far as we were able to figure, that Terminal Leave bond would have paid in the difference and paid several additional premiums, and would have helped him to that extent.

Q. Did you discuss the difference in cost?

A. Yes. We had the tables right in front of us.

The Court: Are you waiving your original objection to this line of testimony?

(Testimony of William C. McIndoe.)

Mr. Brooke: No, I am not, your Honor.

The Court: You are cross-examining on it, though.

Mr. Brooke: If the Court decides to admit it, then, your Honor, I want to cross-examine. I want the cross-examination in the record, in that event.

Q. I did not get the value of this bond that you are talking about. [13]

A. The face value of it was \$225.

Q. \$225? A. That is correct.

Q. Do you recall what amount of money would be necessary to take this insurance back on a 30-day premium? A. No, I don't remember that.

Q. Do you have an approximate idea of how much more in premiums your son would have to pay per year on a 30-Pay-Life compared to this term insurance?

A. I am not sure of that, but I think it was about an additional \$4.00; that is about \$10 monthly premiums he would have to pay.

Q. What type of bank account did your son have? A. Checking; commercial checking.

Q. From your direct examination I understood that you talked over with your son the various steps he decided to take with his insurance. Did you discuss this credit with him to any appreciable extent?

A. I don't understand your question.

Q. Did you discuss the credit that your son told you about to any appreciable extent?

(Testimony of William C. McIndoe.)

A. No, because he left so shortly after he told us about that credit.

Mr. Brooke: That is all. No further questions.

Mr. Cole: That is all.

(Witness excused.) [14]

MARTIN MURIE

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cole:

Q. Your address at the present time, Mr. Murie?

A. Going to school in Berkeley, California; 2434 Piedmont Avenue.

Q. You are studying at the University of California? A. Yes.

Q. What are you studying? For what degree are you studying?

A. A Master's degree in history.

Q. Have you previously received a degree?

A. Yes, a B.A. degree in philosophy from Reed College.

Q. When did you receive that degree?

A. Last spring.

Q. Did you know William C. McIndoe, Jr., during his lifetime?

A. Yes, we were very good friends.

Q. For approximately what period of time did you know him? From what date?

(Testimony of Martin Murie.)

A. I first knew him in 1942 when I first entered Reed College. I knew him for a semester and then I think after the war we met again at Reed College in the fall of 1946, and we were close friends from that time until the time of his death.

Q. You were a serviceman yourself? [15]

A. Yes.

Q. With what unit did you serve during World War II?

The Court: I have let a lot of that stuff in, but I don't think it makes a great deal of difference.

Mr. Cole: Yes, your Honor.

Q. In June, 1947, where were you living, Mr. Murie?

A. Well, sometime in the early part of June I left Reed College and I went to my home in Moose, Wyoming.

Q. In what capacity were you employed at Moose?

A. I was working as a ranger for the Park Service.

Q. In what capacity was William C. McIndoe, Jr., employed there?

A. As a member of the trial crew for the Park Service.

Q. Did you and he live together? A. Yes.

Q. Where did you live?

A. We lived at my father's ranch.

Q. Did you share a cabin together?

A. Yes, three of us.

Q. By the three of you, who was the third one?

(Testimony of Martin Murie.)

A. Mark Woodbury, who also went to Reed College.

Q. Did the three of you bunk together?

A. Yes.

Q. This relationship continued throughout the latter part of June and July until the time of his death in August?

A. Yes. [16]

Q. During this period did you ever hear him discuss his National Service Life Insurance policy?

A. Yes, I did.

Q. What did he say in connection with it?

Mr. Brooke: The same objection, your Honor.

The Court: The objection will be understood as applying to all this testimony. It is admitted, subject to the objection.

Q. (By Mr. Cole): What did he say in connection with keeping it in force?

A. I can't remember anything specific. I can't repeat his exact words on that matter.

Q. Will you repeat the gist of his words?

A. Yes. To the best of my knowledge, he said that, due to the fact that he had a credit, he intended to continue holding his insurance in force.

Q. Was there any conversation between the three of you in respect to the advantages of continuing the insurance in force?

A. Yes. We discussed our insurance many times during the summer.

Q. How many times would you say you discussed it thoroughly between the three of you?

A. I would say that the number of conversations

(Testimony of Martin Murie.)

on that would be four or five, I think, during the course of the summer.

Q. Did William C. McIndoe, Jr., give any reason for keeping his National Service Life Insurance in force; that is, any [17] advantages for keeping it in force?

A. Yes. There was one reason on which we all three agreed, and that was that we had had these policies for quite a while and we didn't want to lose them; secondly, because we had heard about some plan for conversion—we were all having trouble with our insurance and we were rather confused about it. We wanted to try to hang onto our insurance until we could get it straightened out as to what advantages there were in this conversion plan.

Q. Was there any fourth party who discussed the conversion plan with you during the summer?

Mr. Brooke: That is immaterial, your Honor, and irrelevant. A fourth person? I didn't know that there was a fourth person there.

Mr. Cole: I believe that this matter of the intent of a deceased person is one of the most difficult things to get at.

The Court: I am going to allow a wide latitude here. You just go ahead and, after all the testimony is in, I might then feel that much of it is inadmissible, but I am going to let you make your case, so go ahead.

Q. (By Mr. Cole): Was there any person besides the three of you who ever joined in the con-

(Testimony of Martin Murie.)

versations relative to the National Service Life Insurance?

A. Well, there were several other people at various times. The only one I can recall specifically now is a girl in Wyoming who had been in the Waves and who told us about her plans for converting [18] her insurance, and she told us——

The Court: Was the deceased there with you at the time?

The Witness: Yes.

The Court: Where did this conversation take place?

The Witness: In a car. We were driving in a car.

The Court: Go ahead.

A. The result of this conversation I recall was that we all—we couldn't get all the straight dope from this Wave, so we decided the best thing we could do was to cut through all this red tape which we were involved in at the time and try to find out about the conversion plan, and to convert our insurance as soon as we got it straightened out. There were four people there, and we all agreed on this conclusion.

Q. (By Mr. Cole): Did the deceased, Mr. McIndoe, in his conversation with you during this time, ever mention his Terminal Leave bond?

A. I can't remember.

Q. Were the three of you living close together in respect to your eating, recreation and going to the post office and so on?

(Testimony of Martin Murie.)

A. Yes. We climbed mountains together on our days off, and we all had our breakfast at the ranch, and Mark and Bill had their noon meal at the Park Service headquarters.

Q. How far away was the post office from where you were living?

A. One mile from the ranch.

Q. What was the usual procedure in getting mail? [19]

A. Well, we got mail once a day from the post office. Whatever member of the family would be—whatever member of the family happened to be up there or coming home would stop and pick up the mail and bring the mail for all the people who were living on the ranch.

Q. Was it possible to purchase post office money orders at this post office at Moose, Wyoming, as far as you can recall?

A. Well, it is a small post office. I have never gotten any money orders there myself. I couldn't say.

Q. Do you know whether or not the deceased had money on his person at the time of his death?

Mr. Brooke: That has been established, your Honor, I believe.

The Court: Go ahead.

Q. (By Mr. Cole): Answer.

A. Yes, I found the money myself.

Q. Approximately how much was it?

A. I can't remember. I didn't count it.

Mr. Cole: You may examine.

(Testimony of Martin Murie.)

Cross-Examination

By Mr. Brooke:

Q. I believe as to the question as to whether the deceased intended to keep his insurance, your answer was likewise that, due to the fact that he had a credit, he intended to keep his insurance in force. Do you mean to indicate that if he did not [20] have this credit he was going to drop his insurance?

A. No, I didn't mean to indicate it.

Mr. Brooke: No other questions.

The Court: None of the boys over there were very flush with money, were they?

A. Well, I had a pretty good job. I was the only one——

Q. Did Woodbury have quite a bit of money?

A. No, not very much.

Q. What was the discussion on whether it would be wise for fellows of limited means, who were going to school, to continue to save this insurance when they might use the money for other purposes that they needed very badly? Did you discuss that?

A. Well, we figured it was worth while, even though we did have to scrape to do it.

Q. Was there a doubt in young McIndoe's mind as to whether or not it would be advisable to continue or not continue?

A. No, I don't recall any doubt in his mind about continuing it. It was mostly the status of just what kind of policy he would have and just where he stood with the VA that he was in doubt about.

(Testimony of Martin Murie.)

Q. Didn't he tell you he had already determined to convert it to a 30-Pay-Life policy? A. No.

Q. He never told you that?

A. No. As I say, we discussed this with the ex-Wave. That is [21] the first time I can recall this coming up because it was new to me. I didn't know about this opportunity.

Q. Opportunity to do what?

A. To convert.

Q. Did young McIndoe tell you he was not making the payments because he had a credit coming?

A. Yes, he said he had a credit which he thought would carry for several months ahead and figured he was paid up several months ahead.

The Court: That is all.

Mr. Cole: That is all.

(Witness excused.) [22]

MRS. ELIZABETH McINDOE

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cole:

Q. Will you state your name?

A. Mrs. Elizabeth McIndoe.

Q. Where do you live? What is your address?

A. 119 Northwest 21st Avenue.

Q. Your occupation?

(Testimony of Mrs. Elizabeth McIndoe.)

A. Housewife and mother.

Q. Were you in World War II?

A. Yes, I was.

Q. In what capacity? A. A WAC.

Q. Do you have now a National Service Life Insurance policy?

A. I do at the present time, yes.

Q. Did you live on Southwest Scholls Ferry Road in the fall and winter of 1946 and the spring of 1947? A. Yes, we did.

Q. Did the decedent, William C. McIndoe, Jr., call at your home on occasions?

A. Yes. I remember—I probably saw more of him than his father did.

Q. Incidentally, he was your stepson?

A. Yes. [23]

Q. On week ends would he stay at your house and some evenings?

A. When he didn't go up to the mountains, he always came by.

Q. Did you have any conversations concerning his National Service Life Insurance?

A. During that whole year whenever we saw him?

Q. Yes. A. Yes.

Q. Were you and Mr. McIndoe present with him on those occasions? A. Yes.

Q. What did he say, if anything, in regard to continuing his National Service Life Insurance?

Mr. McEwen: That subject, your Honor, has been gone into heretofore in the testimony already

(Testimony of Mrs. Elizabeth McIndoe.)

given. I don't see where any further purpose would be served to establish by another witness that this man said that he intended to keep his insurance.

The Court: You are objecting to it on that ground, also?

Mr. McEwen: On the ground that it is hearsay and self-serving.

The Court: What is this witness going to testify to? The same thing?

Mr. Cole: Substantially the same thing, your Honor. I think this witness is able to place a little bit better meaning on the conversation relative to the credit.

The Court: All right. Go ahead. Let her proceed. All this will be admitted, subject to the objection. [24]

Mr. Cole: Yes, your Honor.

The Court: Mr. Brooke and Mr. McEwen, you won't have to object any more. The testimony is received subject to your objection.

Q. (By Mr. Cole): Mrs. McIndoe, what was said in connection with the advantages of maintaining this National Service Life Insurance policy in force? A. What were the advantages?

Q. What were the advantages that young Bill spoke about?

A. Well, on several occasions he was quite serious about getting married. When I say "several occasions," it was the same girl, but it blew hot and cold, and he realized it would be an invaluable security for his own family if he did marry and had

(Testimony of Mrs. Elizabeth McIndoe.)

something that he could probably keep in force as it was, whereas he could not afford to take out a civilian policy of the same type.

Q. Was there anything said about the loss in view of dropping the policy?

A. Yes. He felt he had invested quite a bit in it and that it was like savings. I mean, that is why he kept it.

Q. Was anything said about the advantages of conversion?

A. I think the main thing was that, due to the fact that he had had the policy in force since an earlier date, that of course made a lower premium rate.

Q. Do you know whether he left a Terminal Leave bond with his [25] father when he went to Wyoming?

A. Yes, he gave it to both of us.

Q. Did you overhear a conversation between himself and his father relative to a credit on his National Service Life Insurance policy?

A. Well, I wouldn't say I overheard it. I was there at the time. I was more or less in on the conversation.

Q. There was no one else present besides yourself and your husband?

A. We have a small daughter.

Q. No one else present besides your daughter?

A. No.

Q. This conversation occurred in your home?

A. Yes, sir.

(Testimony of Mrs. Elizabeth McIndoe.)

Q. Do you recall the approximate date of this conversation?

A. Well, I think there were several conversations, because the discussion had gone on for some time, especially since he was trying to figure out——

Q. I mean the conversation in regard to the credit.

A. The credit?

Q. Yes.

A. That was when his father was talking to him about his finances, and for him to do anything that should be taken care of while he was away.

Q. On what approximate date did this conversation occur? [26]

A. Well, I would say around the first week in June. It was just before he left.

Q. Do you recall anything particularly that enables you to fix that as being the first week in June?

A. Well, only that his friends, Martin Murie and Mark Woodbury, were going to be up there—were going up there to Wyoming—I believe they had already gone or, rather, they were planning to leave ahead of the time Bill was to go, and he had kept in rather close communication with me because he was very anxious to get a letter confirming his appointment in the Park Service, and that was at the time he was taking his examinations and it was, I would say, around the 1st of June, and I did call him when the letter came to him and the boys—I think there were the three that I have mentioned and another boy—I don't know. They came out to my house and got the letter.

(Testimony of Mrs. Elizabeth McIndoe.)

Q. Notifying him that his job was awaiting him?

A. Confirming his job; and he left almost immediately afterwards.

Q. What did young Bill say, as far as you can remember, about his father's offer of financial assistance during the summer?

A. He said he didn't need any money and that he was closing his checking account. I think he had it mainly to pay his bills at school and things like that. He said that he would not need any money and that everything was taken care of.

Q. In connection with the National Service Life Insurance?

A. That he had not taken care of until he got back to school. [27]

Q. Do you know the approximate date that school reconvened in the fall?

A. Yes, I know it was going to be sometime around the 18th of September, because that was our little girl's birthday and we had joked with Bill about his being back for her birthday.

Mr. Cole: You may examine.

Cross-Examination

By Mr. Brooke:

Q. When did you take out your National Service Life policy? A. I beg your pardon?

Q. When did you take out your National Life policy?

A. I didn't take it out until after I got out of the service and saw a notice that handicapped vet-

(Testimony of Mrs. Elizabeth McIndoe.)

erans could still get insurance. I didn't feel I could afford it when I was in the service, because I had a civilian policy and I only got \$27.00 a month and it was all I could do to pay my civilian policy.

Q. When was that? When did you take out your policy?

A. I think it was about a year ago. It was when it was happening to handicapped veterans who had not yet had policies.

Q. You stated here how young Bill McIndoe had kept his financial affairs. Did he take care of those things by himself, or did he discuss them continuously with you and your husband?

A. No, he was very independent. He realized my husband supported his mother and grandmother and he knew we had all we could [28] handle, and Bill was very proud, independent. However, he knew if he needed money or if he needed any help we would gladly give it to him, and we had on several occasions without his even asking for it.

Q. Generally, did he take care of his affairs with expedition and in good order?

A. Yes, I think he was very meticulous about that.

Mr. Brooke: I believe that is all the questions I have.

Mr. Cole: That is all.

(Witness excused.)

The Court: Are you going to have another witness?

Mr. Cole: No, your Honor.

The Court: There is a young man back here who seems to want to testify.

Mr. Cole: Yes, your Honor. We will call Mr. Woodbury. [29]

MARK L. WOODBURY

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cole:

Q. Your name is Mark L. Woodbury?

A. Yes.

Q. Your address?

A. 1414 Southeast Lambert Street.

Q. Your occupation at this time?

A. Student.

Q. Are you also a part-time lecturer?

A. No, I am not.

Q. Is your father? A. My father is.

Q. Some few weeks ago were you out of the city?

A. Yes.

Q. This last summer, I mean?

A. Yes, I was.

Q. Did you know William C. McIndoe, Jr., during his lifetime? A. I did.

Q. Where did you know him?

A. At Reed College and at Moose, Wyoming, while I worked with the Park Service with him.

(Testimony of Mark L. Woodbury.)

Q. What sort of work did you do for the Park Service? [30]

A. I was a laborer. We worked on roads and also on trails.

Q. Did you live together with Mr. Murie and Mr. McIndoe? A. Yes, sir; I did.

Q. You bunked together in the same cabin?

A. Yes.

Q. This condition continued, did it, from the early part of June until August when Mr. McIndoe met his death? A. Yes, it did.

Q. During this interval did you hear him discuss his National Service Life Insurance?

A. Yes.

Q. In connection with his policy, were the advantages of maintaining it discussed?

A. Yes, we discussed it.

Q. What did he say?

A. That his insurance, I guess, had lapsed and we talked about it with him. There had been a good deal of irritation that we all felt towards the Veterans Administration in this regard because of the difficulty—we were faced with the same result when we wrote to them. He was trying to get his insurance reinstated and there were a great deal of letters coming back and forth all summer.

Q. Did he ever show you any of the letters?

A. Not that I remember. He may have. I am not sure.

Q. Did he ever discuss the credit with the Vet-

(Testimony of Mark L. Woodbury.)

erans Administration [31] that he had on his policy?

A. I don't know. I vaguely remember—I really couldn't say.

Q. Were you here when Mr. Murie was being questioned by me? A. No, I was not.

Q. Do you recall a Wave or an ex-Wave, rather, discussing with you the advantages of the National Service Life Insurance during the time you were in Moose? A. A Wave?

Q. An ex-Wave?

A. No, I do not. As to the value of the National Service Life Insurance?

Q. Do you recall a conversation where there was a girl who had been in the Waves who talked with yourself and Mr. McIndoe and Mr. Murie something about the National Service Life Insurance and the possibility of converting?

The Court: I would not go any further with him now on that point. That is enough of a lead. He either had a conversation or he did not.

Mr. Cole: I was trying to refresh his memory.

The Court: I think you have gone far enough to refresh his memory.

The Witness: I am sorry. I don't remember.

Q. (By Mr. Cole): Did the three of you intend to return to Reed College in September, 1947?

A. Yes, we did. [32]

Q. Did the three of you discuss your plans for getting this confusion straightened out, in 1947, in the fall?

(Testimony of Mark L. Woodbury.)

A. We did, but we didn't—I don't know as we decided when we were going to do it. My insurance had lapsed I think at the time, too, and when I got back to Portland I did straighten it out.

I went to the Veterans Administration and straightened it out, and all three of us tried to do this all summer. The reason it is so confusing in my mind is because there were three—all our three insurances were in different states of lapse—well, at least Bill's and mine were in different states of lapse, and reinstatement and so forth, because of the letters, and somehow there seemed to be confusion.

Q. Do you have your policy in effect now?

A. No, I don't, but that——

Q. That is another story? A. Yes.

Q. You did get it into effect in the fall of 1947?

A. Yes, I believe so.

Q. During the summer of 1947 what expression, if any, did Mr. William C. McIndoe, Jr., make about getting the policy in order and keeping it in order? A. He intended to reinstate it.

Q. I see.

A. And he was always in that frame of mind that he was going to reinstate it, apparently, as soon as he could. He was carrying [33] on correspondence with them and he was quite upset about it a good deal of the time.

Q. Did you see any of the letters that he wrote to the Veterans Administration concerning it?

A. Not that I remember. I may have.

(Testimony of Mark L. Woodbury.)

Q. Did you ever see any of the letters that he received from the Veterans Administration?

A. I don't remember of them, no. I remember of him getting them, but I don't remember their contents.

Q. Mr. Woodbury, when you use the term "re-instatement," is that the same term that Mr. McIndoe used? Are you quoting him varbatim, or is that just the general impression that you got from the tone of his conversations with you?

A. No, I am not. He said he was going to reinstate it. I don't know whether he used that term or not.

Q. I see. Let me ask you this: Was the gist of his conversation——

Mr. Brooke: He has stated the conversation.

The Court: Yes.

Mr. Brooke: He has testified as to what he knows the deceased to have said.

The Court: I am going to allow him to go ahead. All we are trying to find out is what the facts are. I have a few questions in mind myself. If you want me to, I will ask them now.

Mr. Cole: Go ahead, your Honor. [34]

The Court: Did young Bill McIndoe talk to you about the possibility of converting this policy?

A. Yes, I believe he did, in the early part of the summer.

Q. How well did you know Bill McIndoe?

A. I knew him very well.

(Testimony of Mark L. Woodbury.)

Q. Were you in the same class with him at Reed?
A. No, I was not.

Q. Did you go to Reed?

A. Yes. I knew him very well at Reed.

Q. Did you fraternize with him there and with young Martin Murie?
A. Yes.

Q. Did you, from time to time, go over to the McIndoe house?

A. Yes. We went over there before school was out or just after school was out.

Q. Did you live on the campus?
A. Yes.

Q. Where did Bill live with reference to you?

A. He lived off the campus, but he was in our room a good deal of the time.

Q. Did he discuss this National Service Life Insurance with you from time to time before he left?

A. Not that I remember. He may have, because it was a very common topic of conversation. The conversation, as I remember, was during the summer, when we had more time to deal with that particular [35] thing.

Q. But during the latter part of May and June you do not recall any other conversation with reference to the National Service Life Insurance?

A. No, I don't.

Q. You were pretty busy with examinations and other things?

A. Yes, I was. There may have been conversations and I might be able to recall them, but I can't at this moment.

(Testimony of Mark L. Woodbury.)

Q. When you were in Wyoming, you did discuss the National Service Life with Martin Murie and Bill McIndoe on several occasions?

A. Yes, we did.

Q. What was the condition of the finances of Bill McIndoe when he went up to Wyoming?

A. Well, let me see. He was buying an automobile from his grandmother.

Q. Was he in pretty good financial shape, or did he have difficulty?

A. He was making money. When he was killed, he had money, quite a bit of money. He saved a great deal of money.

Q. But when he finished school, at the end of the school year, did he have very much?

A. I don't know. I wouldn't know. I could only guess. For myself, I didn't have much.

Q. When he discussed the question of reinstatement of the policy with you, did he mention the reasons why he had let the policy [36] lapse?

A. No, he didn't. I think he may have—I don't know.

Q. But he did not mention it to you, or at least you do not remember about any conversation as to the reason why he failed to make the payments?

A. No, I don't.

Q. Did he tell you he had determined to convert the policy to a 30-Pay-Life policy?

A. Martin talked about it—I remember one particular afternoon we talked about conversion.

Q. Conversion?

(Testimony of Mark L. Woodbury.)

A. Yes. I think Bill did say, yes, that he was going to convert. I don't know when.

Q. Did he ever tell you that there was any credit due on the policy that he had taken out, the National Service Life policy?

A. Credit due to him?

Q. Yes.

A. You asked that question before. Vaguely, I remember something about it.

Q. Did he tell you how he intended to reinstate the policy? A. No, not that I remember.

Q. Are you sure the impression was that it should involve reinstatement of the policy and not conversion of the policy?

A. Well, it was, so far as I remember, that he was going to reinstate it. He said so. [37]

Q. And once he reinstated he would convert?

A. Well, I don't know.

Q. There is no mistake about that?

A. No, there is no mistake about that.

Q. How many times did he talk about reinstatement of the policy? How many discussions did you have during the time you were up in Wyoming, bunking together? A. I have no idea.

Q. Was it more than once?

A. More than one; oh, certainly, more than one.

Q. Three or four times at least? A. Yes.

Q. And how many times do you recall he talked about the conversion of the policy?

A. The talk of the conversion was only once, although it may have been more. As I remember—I am very confused on this.

(Testimony of Mark L. Woodbury.)

Q. You may be confused about many things.

A. I am not confused about what Bill intended—but what Bill intended to reinstate his insurance. I am confused on certain of the various—I am confused on the date that he got letters.

Q. He never showed you the letters that he had received from the Veterans Administration?

A. He may have shown them to me, but I don't remember.

Q. Did he indicate that he was confused by means of the communications which he had received from the Veterans Administration? [38]

A. Yes, he did.

Q. Because he did not know what they meant?

A. Well, he had different ideas about them, but he didn't state—there were some things they did that he did not understand.

Q. And you had the same experience?

A. Yes.

Q. And so did Murie? A. Yes.

Q. In other words, all three of you had talked about the inability of the Veterans Administration to make themselves clear? A. Yes.

Q. There was difficulty of understanding the regulations?

A. Yes. The big thing would be that you would send a letter and the letter would not be acknowledged or they would not know about it somehow, and they would ask for the same information again.

The Court: Do you want to ask any more questions?

(Testimony of Mark L. Woodbury.)

Mr. Cole: Yes, if I may, your Honor.

The Court: Proceed.

Q. (By Mr. Cole): Included in those discussions was there any discussion of any grace period, any mention of a grace period under the National Service Life Insurance policy?

A. Oh, yes, there was. I discussed it—I didn't know exactly [39] what it was.

Q. Do you know whether young Bill knew what it was from his statements?

A. He may have. I don't know. I think I remember him saying what it was, but I don't know. It has been some time and I am very vague about his. I am not very clear.

Q. Were the three of you clear on the point that there was a grace period? A. Yes.

Q. And that if the premium was paid within the grace period the policy would not lapse? Were you aware of that point?

A. Yes. It was 30 days, I believe, something like that.

Q. Do you know whether young Bill thought he could reinstate his policy within the 31-day grace period, or 30-day grace period, whichever it was, if he did it when he came back to school in September?

A. Well, I don't know whether that was within the grace period or not.

Q. I know you do not know, but do you know whether young William McIndoe thought in his mind, from anything that he said, that if he got the

(Testimony of Mark L. Woodbury.)

policy straightened up in the fall it would be within the 31-day grace period?

A. I don't remember. I don't know. I don't know whether he said anything like that or not. I have the impression that his insurance had lapsed longer than that, but I don't know. [40]

Q. Were there some other things involved in this, such as the particular office to which the premiums should be paid and what office had the records, and so forth? Were those also subjects of confusion?

A. Of the particular offices?

Q. The office where payments should be made?

A. I think it was the Portland office. There may possibly have been when Bill was in California, if he had lived there.

Q. Was there some confusion about which office was handling young Bill's policy?

The Court: I think that has been answered several times.

Mr. Cole: Let me ask one more question.

Q. Mr. Woodbury, when you use the term "reinstatement," do you use that to include the straightening out of these other items of confusion, including the payment of the policy up to date?

The Court: I am not going to permit him to answer that, because he has answered it two times. He knows what "reinstatement" means, this young man. I have given you a great deal of latitude here, Mr. Cole.

Mr. Cole: That is all I have.

(Testimony of Mark L. Woodbury.)

The Court: Is there any cross-examination?

Mr. Brooke: A few questions, your Honor. [41]

Cross-Examination

By Mr. Brooke:

Q. What year was Mr. McIndoe in Reed College?
A. When I knew him?

Q. Just before he went to Wyoming?

A. '46 and '47.

Q. Was that his sophomore year?

A. It seems to me he had finished his junior, but I am not sure.

Q. Was young Bill McIndoe aware of the fact that his policy had lapsed?

A. I guess so, yes. I think so. You see, the confusion was so tremendous about whether it had lapsed and he would write back and forth, between him and the Veterans Administration. I don't remember when the insurance had lapsed or when he had paid his last insurance premium.

Q. Did he tell you when he intended to reinstate the policy?

A. I imagine just as soon as—you see, he was carrying on communications with the Veterans Administration to that end.

Q. Was he carrying on these communications while in Wyoming?
A. Yes, he was.

Mr. Brooke: No further questions.

Mr. Cole: Nothing further.

The Court: We will recess until 2:00 o'clock.

(Testimony of Mark L. Woodbury.)

(Thereupon the Court recessed until 2:00 o'clock p.m.) [42]

(Court reconvened at 2:00 o'clock p.m., Friday, November 10, 1950, pursuant to adjournment.)

Mr. Cole: Your Honor, may I have permission to call the witness, Mr. Mark Woodbury, for a question or two? This will be some additional evidence which he has recalled during the recess.

The Court: All right.

Mr. Brooke: This is subject to the objection by the Government on the ground that the witness was given ample opportunity to testify about his knowledge previously.

The Court: I understand.

MARK L. WOODBURY

was recalled as a witness on behalf of Plaintiff and, having previously been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cole:

Q. Mr. Woodbury, have you refreshed your memory by recalling certain events to your mind during this recess the Court has just had?

A. Yes, I have.

Q. Have you recalled something now which the decedent said in regard to the lapse of his policy?

A. Yes, I have. [43]

(Testimony of Mark L. Woodbury.)

Q. Will you state in your own words the substance of what the decedent said concerning the lapse of his policy?

A. Yes. He was very angered because the Government claimed his insurance had lapsed and it had not lapsed, and that was his opinion. He didn't understand what they were driving at, and so that was the cause of a good deal of consternation on his part.

Q. Let me clarify this so we will know exactly what you mean. Will you repeat the gist of his words?

A. Well, yes. The Government claimed his insurance had lapsed, and it had not lapsed—he did not believe it had lapsed. In other words, apparently they had gone back to some previous time, referred back to something that was out of his mind, that he had forgotten about. The thing that I remember most specifically is of Bill being angered because they had fouled it up.

Q. Due to the technical rules of evidence—I want to ask you this: Is this opinion which you have just stated your own conclusion, or is that the gist of what the deceased said?

A. It is the gist of what the deceased said.

Mr. Cole: You may examine.

Mr. Brooke: I didn't hear the last question and answer.

(Last question and answer read.) [44]

(Testimony of Mark L. Woodbury.)

Cross-Examination

By Mr. Brooke:

Q. You previously testified Mr. Bill McIndoe intended to reinstate his policy. Is that so?

A. Well, I didn't recall very clearly this morning the exact situation. If I could explain it——

The Court: He did not change his testimony.

Mr. Brooke: That is all.

(Witness excused.)

Mr. Cole: Now, if your Honor please, the plaintiff has no more witnesses to call. However, it is the plaintiff's contention, based upon Exhibit C and based particularly upon Paragraph 4 of Exhibit C, that the Veterans Administration could have and should have made an administrative adjustment of this policy to the extent of three instead of two missing premiums. The gist of the correspondence which the plaintiff received from the Veterans Administration is to the effect that the Government had waived two missing premiums, and those two are set forth in the pre-trial order on Page 2, in Paragraph 4.

However, a careful reading of this Exhibit C indicates that the Veterans Administration was authorized to waive three. I feel, your Honor, a reading of this administrative bulletin will stand for itself, and that a waiver should have taken place for this additional month. [45]

The Court: Was the waiver of premiums a mat-

ter of discretion with the Veterans Administration?

Mr. Cole: I could not answer that, except as far as it appears in this bulletin——

The Court: You said they were authorized to. Does that require the waiving of three premiums in this case, or that they had the authority to do so?

Mr. Cole: I would say, your Honor, that they had the authority to do it and that under these regulations they were required to do it.

The Court: Are you offering the regulations in evidence?

Mr. Cole: Yes, if I may, your Honor.

The Court: Mr. Brooke——

Mr. Brooke: Yes, your Honor.

The Court: ——I saw you getting up. Do you want to interpose an objection to the admissibility of Plaintiff's Exhibit C?

Mr. Brooke: If I am correct, the plaintiff is attempting to set up an estoppel, and I do not believe that this can be done on the ground of estoppel. In any event, the interpretation placed upon the bulletin is certainly——

The Court: I am not concerned with what interpretations are placed upon the bulletin. The question is: Do you object to the admission of Plaintiff's Exhibit C and, if so, on what ground?

Mr. Brooke: I object to it, your Honor, on the ground that there has been no foundation laid for the admission of that document. [46]

The Court: There is no question in your mind, is there, that this is a true copy of a bulletin put out by the Veterans Administration?

Mr. Brooke: No, your Honor.

The Court: The only ground I can see, Mr. Brooke, is its materiality. In view of my previous rulings, I am going to overrule your objection and admit it. Exhibit C is admitted, as well as A and B.

(Copy of letter, William C. McIndoe, Jr., to Veterans Bureau, in re payment of premium due for April on National Service Life Insurance policy, was thereupon received in evidence and marked Plaintiff's Exhibit A.)

(Copy of letter dated May 29, 1947, Veterans Administration, District Office No. 12, to Mr. William C. McIndoe, Jr., Portland, Oregon, was thereupon received in evidence and marked Plaintiff's Exhibit B.)

(Veterans Administration Technical Bulletin TB9-53, September 25, 1947, was thereupon received in evidence and marked Plaintiff's Exhibit C.)

Mr. Cole: The plaintiff rests, your Honor.

(Plaintiff rests.) [47]

GEORGE W. CHANEY

was thereupon produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brooke:

Q. Mr. Chaney, by whom are you employed?

(Testimony of George W. Chaney.)

A. The Veterans Administration in Portland.

Q. In what capacity?

A. As Insurance Officer for the State of Oregon for the Veterans Administration.

Q. How long have you held that position?

A. It will be five years the 20th of next January, the 24th of next January.

Q. In the course of your duties have you had opportunity to administer this technical bulletin that has been admitted in evidence as Exhibit C?

A. Yes—not to administer, but to train personnel of the VA as to the provisions of the bulletin.

Q. Could you explain how that technical bulletin operates and functions, briefly?

A. There are two main points to the bulletin. One is if the policy had premiums paid on it for July and August of 1947 and thereafter they were paid when due, they forget any previous omissions. For example, if a man had skipped February, 1947, [48] but paid for July and August, then the policy was in force as of September 1st. That is one main section of the bulletin.

The other main section states that if a man had made three consecutive monthly payments he was in force with the third one despite missing a month or so prior thereto, and that was limited, as I recall, through July of 1947. That method of adjustment could not be used by him afterwards.

Q. After July, 1947?

A. That is as I recall the bulletin.

Q. Is there anything in that technical order, or

(Testimony of George W. Chaney.)

bulletin, similar to the interpretation placed on the order by Mr. Cole to the effect that the Veterans Administration, as a matter of right, was required to permit three failures to pay the insurance premium and still keep the policy in force?

A. I do not recall from memory whether there was any limit stated as to the number of times it could have occurred, but it very clearly states three consecutive months must be paid, without any missing months, before it will be administratively considered in force.

Q. Are you familiar with the rates on a 30-Pay-Life policy in comparison with the rates on a term policy, National Service Life?

A. The premiums on a 30-Pay will usually be approximately two or two and a half times as expensive as term insurance.

Q. What if a person chose to take advantage of a cheaper premium rate, is there an interest rate, an interest payment which must [49] be incorporated with this?

A. To convert retroactively to a prior date, you pay the reserve on a converted policy that you are changing to, and that reserve is an increment for future claims, plus the interest.

Q. Are you familiar, in this particular case, with the date of the death of the insured?

A. Yes.

Q. Are you also familiar with the date when he first took out his policy?

(Testimony of George W. Chaney.)

A. From what has been said. I do not recall it from my other observation of the case.

Mr. Brooke: If the Court please, this is something that has not been agreed upon in the pre-trial order. Would it be permissible to give that information to the witness? He is testifying as an expert witness as to this particular question, your Honor.

The Court: As to how much he would have had to pay?

Mr. Brooke: If he had converted the policy back to the time he took it out originally.

The Court: What is the purpose?

Mr. Brooke: Just to demonstrate the financial condition of the insured and the amount of money which would have been required to do so, and how it would appear it would be almost impossible, taking the circumstances into account.

The Court: For the purpose of [50] impeachment?

Mr. Brooke: For the purpose of establishing the intention of the deceased, as previously testified to, and actually for the purposes of impeachment, too, I suppose.

The Court: What difference does it make whether he was going to convert or not?

Mr. Brooke: The testimony was to the effect that he had plans to convert, your Honor.

The Court: Go ahead.

Q. (By Mr. Brooke): In the agreed facts it is stated that this policy was in effect September 28, 1943; also, it is an agreed fact that William C. Mc-

(Testimony of George W. Chaney.)

Indoe, Jr., died in August—August 24, 1947.

Can you state approximately what the cost would be to convert that policy to a 30-Pay-Life back to the time it first became effective, if that was done approximately the time William C. McIndoe, Jr., died?

A. It would be over \$400, something closer to probably \$450.

Mr. Brooke: I believe that is all.

The Court: Is this the man who processed this claim?

Q. (By Mr. Brooke): I believe you did have something to do with it?

A. I had no determination of the claim. I assisted the claimant in filing an appeal to the Administrator, just giving the information necessary, whatever assistance I could in his attempt to have it appealed to the Administrator. [51]

The Court: What is Exhibit A? Where is the file of the Government?

Mr. Brooke: It is in my room, your Honor.

The Court: Why hasn't the file been made available?

Mr. Brooke: It has been available.

Mr. Cole: I understood the file was to be here, if there were any questions that were to be asked. That is the reason I did not have it subpoenaed. We agreed, your Honor, we would have these copies prepared, and so forth, so the originals would not have to be removed from the Veterans Administration file.

(Testimony of George W. Chaney.)

Mr. Brooke: We discussed that, your Honor, because of the fact that the originals would be removed from the file and would have to be in evidence for a certain period of time and, therefore, we stipulated on the authenticity of the copies of the originals.

The Court: Have you seen the Government's file?

Mr. Cole: No, your Honor, I have not. I requested permission to see the file, or my client did, after the refusal of the Board of Veterans Appeals to grant payment of this policy, or on this policy, and then we had what we thought was sufficient information that we obtained from other sources. However, I understood from Counsel that the file was to be available here, together with this witness, so if there was anything your Honor wanted to inquire about it would be available from the original file itself. [52]

Mr. Brooke: I was not aware of that. I did not think the file could be indiscriminately disclosed to the plaintiff's attorney. If he wanted certain papers he could serve notice upon us to produce them. The questions that I have put to the witness have not had anything to do with the file, as far as that goes anyway.

Mr. Cole: I am sorry, your Honor, but I understood Counsel to state, when we were discussing this case, in drawing the pre-trial order, that the file would be available. I, myself, have no reason to see the file because I believe we have made out our case.

(Testimony of George W. Chaney.)

but I wanted it here for the Court's benefit and I understood it was to be here. If I had understood to the contrary, I would have subpoenaed the entire file into court, under the procedure provided.

Mr. Brooke: If you wanted it in connection with your affirmative case, you should have made some kind of a statement to that effect. Your case is closed.

Mr. Cole: I admit that, and we have had these copies made of these documents. I thought that would be for the convenience of all concerned so that the originals would not have to be removed from the Veterans Administration file.

The Court: Did the Government get any communications from the decedent while the decedent was in Wyoming?

Mr. Brooke: I am not certain. I talked to the witness with a view to finding the pertinent letters in this particular file, [53] and we found those that we thought were pertinent to the case. It is a rather big file.

The Court: I do not think where the Government is involved that anything should be kept out. I will order that the file be produced.

Mr. Brooke: Do you wish me to get that at this moment, your Honor?

The Court: You can get the file right now. Do you want to cross-examine this witness? Let him finish his cross-examination and then you can produce the file.

(Testimony of George W. Chaney.)

Cross-Examination

By Mr. Cole:

Q. You said, as I recall, in substance, that if premiums were paid for July and August, 1947, all previous amounts were forgiven, is that correct?

A. That is essentially right.

Q. Does the use of the term "all" mean two or three? Does that include two or three, both?

A. It is a very involved technical bulletin, but I do not recall any limitation on the number. I would have to refer to the exhibit.

Q. I will hand you Exhibit C and call your attention to Paragraph 4. Would you read that paragraph, please?

A. "Prior instructions of November 8, 1946, as amended May 9, [54] 1947, authorized adjustment of insurance by establishment of a lien for the missing months in cases in which there were not more than three missing premiums and provided premiums were timely paid for at least three consecutive months through the current month; the current month then being November, 1946, but the rule is applicable to any such case in which the third premium in a series of three or more consecutive premiums was timely tendered for November, 1946, or for any subsequent months through July, 1947."

Do you want the rest of it?

Q. No. Having read this technical bulletin, that provision of it, would you say if premiums had been

(Testimony of George W. Chaney.)

paid for at least three consecutive months, through the current month, the current month would be any month between November, 1946, and July, 1947?

A. I don't know that I follow your question.

The Court: I don't think you have to have his interpretation of what the bulletin says. I think we can understand what the bulletin says.

Mr. Cole: I think that is all.

The Court: Don't you know what the bulletin says?

Mr. Cole: Yes, your Honor.

The Court: Is the language ambiguous?

Mr. Cole: Well, yes, it is somewhat.

The Court: Are you of the opinion that it waives the payment of premiums subsequent to the third consecutive payment or [55] the three consecutive payments made?

Mr. Cole: No. I am of the opinion that it waives the premium for the current month—that it waives the premium if the current month is timely paid. What I am trying to find out is whether the current month may be November, 1946, and any subsequent month between November, 1946, and July, 1947.

The Court: Are you just testing this witness' knowledge, or are you referring to a specific case and, if so, is the case you are referring to the case involved in the case at bar?

Mr. Cole: Yes, your Honor. That is correct. The case involved is the case at bar. This is the one I am referring to.

(Testimony of George W. Chaney.)

The Court: On Page 2 of the pre-trial order you have a series of payments made and the corresponding dates of payment. If you want to show this to the witness and ask him whether or not the decedent was entitled to another month's waive, I will permit you to do so.

(Exhibit C handed to the witness, together with the pre-trial order.)

The Court: Ask your question.

Q. (By Mr. Cole): You have been handed the pre-trial order in this case and your attention has been called to Paragraph 2 or, rather, Page 2 thereof, Paragraph 4, in which is listed a schedule of premium due dates and a schedule of dates of payment.

Under the Veterans Administration Technical Bulletin, which is Exhibit C in this case, are you authorized to waive more [56] than two monthly premiums, or would the Veterans Administration be authorized to waive and required to waive more than the two premiums that are shown therein as waived?

A. No. The two that were waived were waived under this TB9-53. The two shown on the list as waived were waived under authority of this TB9-53.

The Court: I think what Counsel is referring to is: Could they have waived the payment of premium due on June 28, 1947? Isn't that the point?

Mr. Cole: That is correct.

A. No, sir, because it waives only for prior

(Testimony of George W. Chauey.)

period, and then if three consecutive months through July, 1947, were submitted under this directive I don't see how we would be authorized to waive any future premium that was not covered by this requirement that three consecutive premiums be paid through July, 1947, or prior thereto.

Q. Calling your attention to the date of payment schedule, I point out that three consecutive payments were made and they are designated April 11, 1947; April 11, 1947, and May 1, 1947. Doesn't that satisfy the requirements for three consecutive payments?

A. Yes, for everything prior thereto that might have been missed.

Q. Calling your attention to the date of payment schedule, and pointing out that the next to the last premium due, listed there, was April 28, 1947, actually paid on April 11, 1947, and credited, [57] according to the schedule here, to the previous payment due March 28, 1947, would it have been possible under existing regulations for the Veterans Administration to credit the veteran on the payment that he made on April 11th for April and May and waive in addition the March 28th payment?

A. No, sir, not under the directive, because that premium was submitted within the grace period of the March, 1947, premium due date, and we have to submit any premium that is submitted within the grace period.

Q. Well, that is true as to the premium——

(Testimony of George W. Chaney.)

The Court: Mr. Cole, even assuming you are correct and would be entitled to one other month, how would that affect the plaintiff's right to recover in this case? The last premium credited to the deceased was May 28, 1947. Assuming that another payment was to be credited, that would be June 28, 1947, and add 31 days beyond that and you are still paid to August 1st, and the decedent died on August 24th. I don't understand that, but go ahead.

Mr. Cole: Let me explain this, if I may, your Honor. I believe that this witness can tell us these premiums are payable in advance.

A. They are due on the due date or within 31 days thereafter.

Q. Calling your attention again to the last premium due date listed on Page 2 of the pre-trial order, May 28, 1947, wouldn't that payment carry the policy in force until the 28th day of June,[58] 1947?

The Court: The 29th.

A. Carry it until the 29th day.

Mr. Cole: Yes; and, so, this policy was actually paid until June 29, 1947?

A. Through June 29, 1947.

Q. And one additional premium payment, if it had been made, of \$6.50 would have carried this policy through July 28th?

A. Either the 28th or 29th of July if another payment had been made.

Q. Then, by the terms of the policy, it is in effect for 31 days even after the last premium has been paid; there is a 31-day grace period within

(Testimony of George W. Chaney.)

which, if death occurs, the policy became payable?

A. That is correct.

Q. So, even if no payment had been made after the payment up to July 28th or 29th, this policy would have been in effect to and including August 28 and 29th? A. No, sir.

Q. I mean, as far as payment by the Veterans Administration is concerned?

A. If one more payment had been made, it would have covered in case of death up to July 28th or 29th. It would have been due June 28th and the next premium would have been due July 28th.

The Court: I think, Mr. Cole, you are a little mistaken on [59] your figures because if a premium is due on June 28th the policy is in force until July 29th. The insured does not get 31 days from July 29th within which to make that premium payment. The policy lapses on the 30th of July. That is the way all insurance is written.

Mr. Cole: Yes, your Honor, I understand the policy lapses, but it is my understanding if the deceased died within 31 days of the date of lapse—

The Court: Within 31 days of the date of the last premium payment, the last premium when due. If a premium were paid on June 28th, and if he had made an additional payment on June 28th, then that policy would have been in force and the plaintiff could recover if the decedent died any time up to or through July 29th, not August 29th or August 30th. I don't think there is any use taking up additional time on that.

(Testimony of George W. Chaney.)

Mr. Cole: This is a very serious thing, your Honor, and it is my fault if it is because I have alleged one payment on the ground that I understood if this one payment had been made that would have carried it to July 28th, and the death would have been within the 31 days. I do not think it affects the fundamental theory of the case.

The Court: I think you had better direct your attention to the particular inquiry contained in Exhibit B and see what that means.

Q. (By Mr. Cole): Will you look at Plaintiff's Exhibit B which is [60] attached to the pre-trial order?

The Court: I think the witness has the original of it, but, in any event, you can straighten it out.

Mr. Cole: Will you read the second paragraph of Exhibit B, please?

A. "The records indicate that premiums on your insurance have been paid as shown in Column (3) below. If no remittance was tendered for the premium due on July 28, 1946, or within 31 days thereafter, the insurance lapsed."

Mr. Brooke: Isn't this beyond the scope of the direct examination?

The Court: He will be the Court's witness. I would like to find out about this.

Mr. Brooke: Very well, your Honor.

Q. (By Mr. Cole): If a premium had been paid in this case to include July 28, 1947, as you say, through July 28, 1947, and the insured had died

(Testimony of George W. Chaney.)

within 31 days after July 28, 1947, would the policy have become payable?

A. That is right; if the premium for July 28th had been paid and then the policy holder had died within 31 days thereafter, it would have been payable.

I want to restate that. If he paid his July 28, 1947, premium, the next premium would be due August 28, 1947, and he would have 31 days thereafter. The payment paid for July 28th, 1947, pays to the next due date, or August 28, 1947, and if he dies [61] within the 31 days we subtract the premium for August from the face amount of the insurance. Is that the question you asked?

Mr. Cole: Yes.

A. I didn't understand it before. I am sorry.

Q. Just let me summarize it this way: If the insured makes the monthly premium payments and dies within 31 days after that monthly premium payment——

A. Excuse me.

Q. ——and dies within 61 days after that monthly premium payment, is the policy payable less the premium for the last month?

A. That is correct.

The Court: I don't understand that myself. Take a look at the second paragraph again. It says under (3), "Premium paid through 7/27/1946." Is that correct? This letter is dated in 1947.

A. The question he asked me did not jibe with the dates here.

(Testimony of George W. Chaney.)

The Court: Let's get down to Exhibit B and see what this letter says. Is that date incorrect?

Mr. Cole: No, your Honor, the date is correct. That is the date the letter was written and mailed.

The Court: How about Paragraph 2, under (3), "Premiums paid through 7/27/1946." Is that correct?

Mr. Cole: Your Honor, it is not correct. Let me say this——

Mr. Brooke: It is correct, your Honor, and that is the way the letter was received by the insured. [62]

The Court: Is this a copy of the original letter?

Mr. Brooke: This is an exact copy of the original.

The Court: Is it your contention "1946" should have read "1947"?

Mr. Cole: No, your Honor.

The Court: Now we have got that straight. What do you contend for this letter? We want to find out about it.

Mr. Cole: As to this letter, your Honor, if your Honor will permit me to summarize it, there are two things: It says, first, that, in effect, "If your premium was not paid on July 28th or within 30 days, 31 days, the insurance lapsed." That is the first important thing it says. Then it says that there is enclosed an application for reinstatement. The second important thing it says is that there is a credit of \$25.90. In brief, that is what that letter says.

The letter itself did not answer the request that

(Testimony of George W. Chaney.)

the deceased made to the Veterans Administration, which is Exhibit A. The request was for the status of his policy and the reply, instead of saying "This is the status of your policy" answered it in a kind of a backhanded manner. It just told him two things. It said, "If your policy was not paid approximately ten months ago, then it is out, but we also have a credit which can be applied to your premium payments."

The decedent, your Honor, when he received this letter, knew that the premium for July 28, 1946, had been paid and paid [63] on time. He knew that. He had a cancelled check to show it, and the pre-trial order admits the dates of those payments. He knew the policy had not lapsed, and that was, incidentally, the purport of the testimony of this witness, that he knew his insurance had not lapsed. The second part of the letter tells about a credit, and permitting him to use that credit to apply on later premium payments.

Then, when this matter comes up by the presentation of a claim, the Government denies this Exhibit B and says Exhibit B is all wrong. We have the Veterans Administration saying, "We made a mistake in this letter of May 29, 1947, and you had no credit," and it is a pure case of estoppel that we are urging against the Government. The Government is estopped to deny that it has not received these premium payments because it has told the veteran, "You have got a credit and you can apply that credit." That is the whole case.

(Testimony of George W. Chaney.)

The Court: Is there any question about the statement of Mr. Cole as to what this letter says? There was no adjustment of this policy?

Mr. Brooke: No, there was not. It says here, in effect, if the Court please, that our record shows that payments have been made through July 27, 1946, and then it adds a condition here that if no remittance was tendered until after July 28th, or 31 days thereafter, the insurance lapsed. As Mr. Cole stated, payments were made into the Veterans Administration, and that is [64] even admitted in the pre-trial order. The policy lapsed, your Honor, and he did not have anything to pay on; he must have had some money in there that belonged to him to account for the credit.

But they come in and say that he knew it had not lapsed. We are not so sure of that after the testimony before the Court this morning; but if he knew it had not lapsed, he had cancelled checks; he knew the payments should be made. How could he possibly have had a credit? A credit presupposes the policy has lapsed, and I think that is the only fair interpretation of the letter.

I think that is further established by the letter that was written by the insured himself.

The Court: When?

Mr. Brooke: A letter right prior to this time, and which this letter is in answer to.

The Court: It seems to me if the insured wrote an additional letter to the Veterans Administration—

(Testimony of George W. Chaney.)

Mr. Cole: I think the Court should see those.

The Court: Yes.

Mr. Cole: I will proceed to get those.

The Court: We will take a short recess.

(Recess.)

Mr. Brooke: As I read this letter, it states that the records show that the insured had paid his premium up to and [65] including July 26, 1946. Then it states if no remittance was tendered for the premium due on the next date, or within 31 days thereafter, the insurance lapsed. If that situation is so, there is a credit. I do not see that the Veterans Administration was mistaken or in error there. They are not in error at all. They are making a statement that informs us that there is a credit.

The Court: As long as Mr. Chaney is here, I want him to tell us what this letter means. You have seen this letter time and again?

A. I have.

The Court: I will hand it back to you, and ask you to tell me and the people here under what circumstances would a credit of \$25.90 accrue to the insured?

A. Only if a lapse had occurred, because that credit could have come in this case only from premiums. Any premiums submitted after a lapse, we would have to hold and refund unless the man told us how to apply them on a reinstatement.

The Court: I still don't understand what you are saying.

(Testimony of George W. Chaney.)

The Witness: May I state that a little differently, sir?

The Court: Yes, go ahead.

The Witness: If I owe a premium for December and I don't pay it within 31 days after the 1st of December, my policy will lapse as of the 1st of December, so if I send the premium in, we will say, in February, that money will be returned to me unless I tell them to apply it on a reinstatement and send in the required [66] form.

The Court: In other words, what this letter says is that if you did not pay your premium July 28, 1946, or within 31 days thereafter, or 30 days thereafter, the insurance lapses, and in the event that it did lapse then you would be entitled to \$25.90, the amount paid by you to the Veterans Administration on account of this insurance, subsequent to that time?

The Witness: Subsequent to the lapse.

The Court: \$25.90 is the amount?

The Witness: Yes.

The Court: Does that add up correctly?

Mr. Brooke: I do not believe that total is correct, your Honor, but that is the information that is available to the San Francisco office.

Mr. Cole: May I ask a question to clear this up?

The Court: Go ahead.

Q. (By Mr. Cole): You have been charged with the administration of this case in the Portland office, have you not?

A. My responsibility in this case has been to try

(Testimony of George W. Chaney.)

to furnish any and all information and to help the claimant any way I can. I make no decision of these cases.

Q. You have, however, followed the progress of the case and know what the decisions have been, generally? A. Yes.

Q. Is it not a fact that the credit in Exhibit B was subsequently [67] repudiated by the Veterans Administration?

A. That is correct, because subsequently their records were reviewed and they found it actually had not lapsed in July, 1946, and, therefore, no credit was available. The credit had to be applied on subsequent months, when it was found no lapse occurred back in that year.

Q. Did this change of position by the Veterans Administration occur, to your knowledge, prior to or after the decedent's death in August, 1947?

A. I don't recall when their records were completed to the extent of knowing what is known now.

Q. From your own knowledge, do you know that the payment of the policy, which is the subject of this lawsuit, was denied on the ground that one premium only was missing?

A. They did not state it that way, but if one more had been made we would have paid the claim under the grace period.

Q. Would you briefly state how that would have operated? In other words, how would that have operated from the schedule on Page 2, Paragraph 4? Will you follow that schedule out, making the

(Testimony of George W. Chaney.)

assumption that one additional premium had been paid, and explain how the coverage would have included the date of death or August 24, 1947?

A. The payment that was submitted May 1, 1947, paid the premium due May 28, 1947, and that premium due May 28, 1947, paid through June 27, 1947, with the next premium due June 28, 1947. If [68] a premium had been paid to cover June 28, 1947, it would have paid through July 27, 1947, the next premium due July 28th.

Q. Then, going on from there, July 27, 1947, on the assumption that one additional premium had been paid, will you continue on from July 28, 1947, to show how the policy would have been payable?

A. If it had been paid, the next premium would have been due July 28th, or within 31 days thereafter. Death within the grace period would have caused us to be liable, less one monthly premium.

The Court: Less one monthly premium?

A. That is, subtracting one from the settlement.

The Court: On May 1, 1947, he made the payment for the premium due May 28, 1947? That is correct?

A. Yes.

The Court: Therefore, that premium took him up to June 28, 1947. Would the assured have until July 29, 1947, within which to make such payment or, in other words, would he have coverage until July 29, 1947, under the payment that he did make?

A. Yes.

The Court: What payment did he make?

(Testimony of George W. Chaney.)

Mr. Brooke: May.

The Court: That became due on May 28th. Then, for instance, if the assured had died prior to July 29, 1947, he would have [69] been covered under the payment that was actually made? Then I was in error. In other words, he had two months, 61 days.

The Witness: It is confusing. It was to me. I got stuck a minute ago, the fact it is due the 28th. Most policies, you think of them as due the 1st; the premium for the month of June covers the month of June from the 1st to the end of June, so if I die after the 1st of June I am covered in case of death up until the end of 31 days after the 1st of June. The payment I made for May 1st would have paid me up to June. Another premium would not be due until June 1st and I would be covered for 31 days thereafter. The premium covers 30 days and the grace period covers 31 days. The premium that was due on May 28th was for a period of one month, from May 28th to June 28th, but the due date is in advance for the month it covers, so we will give 31 days leeway for the man to make that payment.

The Court: And the 31 days does not begin to run on May 28th; it begins to run on June 28th?

The Witness: Yes, because May 28th pays through June 27th.

The Court: I have learned something right now.

Mr. Cole: I have been working with this case

(Testimony of George W. Chaney.)

for two or three years and I learn something every day.

The Court: As you construe the letter written by Mr. D. O. Nelson, Director, Insurance Service of the Veterans Administration, the \$25.90 was a credit only in the event the policy had lapsed for failure to make the premium payment on July 28, 1946, or within 31 days thereafter? [70]

A. Yes, sir.

Mr. Brooke: I might point out to your Honor that enclosed with that letter, as stated, was an application for reinstatement, which has been marked, for purposes of identification, as Government's Exhibit D.

The Court: Exhibit D is now being offered?

Mr. Brooke: Yes.

The Court: Is there any objection?

Mr. Cole: The one I have got has no printing of any kind on it.

Mr. Brooke: I think it was a blank form. Perhaps Mr. Chaney can clarify the document for us.

Q. Have you had occasion to see these documents before, Mr. Chaney?

The Court: Just one second on this. Is this the identical form that is used?

Mr. Brooke: I do not believe that is the identical document. I talked to Mr. Chaney and he tells me that is the form that was brought into effect in 1949, but it is substantially the same, with minor alterations. Mr. Chaney can clarify that.

The Court: Go ahead.

(Testimony of George W. Chaney.)

The Witness: It is a revision. They frequently revise these forms, sometimes to clarify them and at other times because of amendments to the law by Congress. I did not have anything to do with revising it, but I would say it was revised from the form that was previously used, or the same form number, but adding [71] Section 7. That provision was not authorized until the amendment in 1946 by Congress. That authorized the TD provision, so when they finally got around to revising the form, they included that blocking. We have so many of these different forms.

The Court: This supersedes Form 9-353a, printed in May, 1947. The date of this letter is in 1947. Can't the Government produce a copy of the application form in effect at that time?

Mr. Brooke: I tried to get Mr. Chaney before he left the office, and he had already left to come to Court. There may be one in the files, too.

The Court: Just one second.

Mr. Cole: The plaintiff tells me he thinks he has that in his briefcase, your Honor, if he may be excused to look through the briefcase.

The Court: Certainly.

Mr. Brooke: Here it is, your Honor.

The Court: Have it marked.

(Form for application for reinstatement was thereupon marked Defendant's Identification No. D-1.)

The Court: Do you want it handed to the wit-

(Testimony of George W. Chaney.)

ness?

Mr. Brooke: Yes, your Honor.

Q. The Bailiff has handed you a document marked D-1 for Identification. Will you examine that document?

The Court: Ask that again. [72]

Q. (By Mr. Brooke): Have you seen that document before, or a similar document to that one?

A. Yes.

Q. Just what is that?

A. It is a comparative health statement application for reinstatement.

Q. What is its form number? A. 9-37.

Q. Does it show at the lower left-hand corner when that document was issued or printed?

A. January, 1947.

Mr. Brooke: At this time, your Honor, I am offering that document in evidence as part of the enclosure that came with Exhibit B.

Mr. Cole: No objection, your Honor.

The Court: It may be admitted.

(Application for reinstatement was thereupon received in evidence and marked Defendant's Exhibit D-1.)

The Court: Are there any other questions, Mr. Brooke?

Mr. Brooke: I have no further questions.

The Court: Mr. Cole, are you finished with your cross-examination?

Mr. Cole: Yes, your Honor, I am.

(Witness excused.) [73]

The Court: Does that complete the Government's case?

Mr. Brooke: There is one point that has been raised by counsel for the plaintiff and that is the fact the insured had cancelled checks to show he had made these payments. I think they also should be produced.

The Court: The Government admits that he made those payments. Why should the cancelled checks be introduced to prove something that the Government admits?

Mr. Brooke: I don't think I want it in for that purpose. Estoppel depends on the basis that the plaintiff did not have any knowledge of his own that these payments—wait a minute. Plaintiff knew that this policy had not lapsed because he has cancelled checks to show how many payments he had made. How can he rely on a credit when none of these cancelled checks——

The Court: That is a matter of argument.

Mr. Brooke: I think they are properly admissible in evidence.

The Court: Mr. Brooke, you have been in this Court a number of times and you know before you can bring in any such evidence you have to identify it in the pre-trial order. You knew about these checks before.

Mr. Brooke: In talking to Mr. Cole it was my impression that he was going to have those in evidence.

The Court: You helped prepare the pre-trial order.

Mr. Brooke: That is correct, your Honor.

The Court: And as an incident to this trial I asked you if that is all you wanted and you said it was. [74]

Mr. Brooke: I expected those to be in the case. I made a mistake, your Honor.

Mr. Cole: Your Honor, the plaintiff certainly has no intention of concealing anything from the Government or the Government's attorneys. I appreciate that this case involves a rather complex question. It was my intention to reduce this case to the utmost simplicity, as far as possible, and that was done, I think, in the pre-trial order by admitting as many things as possible.

The Court: Do you want to join with Mr. Brooke in offering these checks?

Mr. Cole: No, I am not offering the checks. I am just explaining——

The Court: Let me see the checks.

Mr. Cole: Here are the checks and here are the receipts.

The Court: Mr. Brooke, I can't see how these checks can prove anything that is not already admitted in the pre-trial order.

Mr. Brooke: My point is that if the deceased had canceled checks in his possession he could check up and find out if his policy was to his credit or whether he actually owed money on his policy. That is the reason I thought that these might be pertinent in this case.

The Court: Let the record show that he made the payments by check, the payments listed on Page

2 of the pre-trial order, [75] and that he received receipts therefor. Is there any objection to that?

Mr. Cole: No objection.

The Court: The case, then, is closed except for the production of the file of the Government in connection with the claim of William C. McIndoe, Jr., and it is understood that plaintiff's counsel will have opportunity to examine all communications between the insured and the Government and all letters written on behalf of the insured to the Government and, likewise, all responses thereto; office memoranda, briefs, and other matters in the file will not be available to the plaintiff.

Mr. Brooke: Am I correct in understanding you are making particular reference to documents written subsequent to the letter that has been marked Exhibit A and the letter that has been marked Exhibit B in this case?

The Court: Yes. I am particularly interested in any communication that was sent by the insured to the Veterans Administration after the exhibits attached to the pre-trial order, because they may tend to explain and show whether or not he was actually misled by this letter, which is Exhibit B.

Mr. Brooke, will you furnish this file to the Court and, after I have looked at it, will you communicate with Mr. Cole?

Mr. Brooke: Yes.

The Court: After you have examined that file, then, if you want to argue the matter, it will be set down for argument. It [76] may very well be that we will want Mr. Chaney back here.

Mr. Brooke: Yes.

The Court: All other witnesses are excused permanently.

Mr. Cole: Yes.

Thereafter, on February 17, 1951, the Court rendered the following oral opinion:

William C. McIndoe, plaintiff, as beneficiary of a National Service Life Insurance policy issued on the life of his son, William C. McIndoe, Jr., filed this action to recover benefits provided for under such policy. The defendants, the United States of America, refused payment on the ground that the premiums had not been paid to the date of the death of the insured. The plaintiff contends that the defendant is estopped to assert such lack of payment by reason of the fact that the Director of Insurance Service of the Regional Office of the Veterans Administration, on May 29, 1947, sent to the insured a misleading letter in response to a letter from the insured in which he enclosed \$6.50, the premium for one month, and in which he requested information as to "just where I stand." The Director's letter, plaintiff claims, led the insured to believe that he had credit of \$25.90 which amount, lacking 10 cents, was sufficient to pay four monthly premiums.

It is unnecessary to pass upon the question of whether the letter, together with the other evidence in the [77] case, contains all the elements of an estoppel for the reason that I have come to the conclusion that the United States may not be estopped to assert any defense available to it on a policy of National Service Life Insurance because

of any action of an employee of the Veterans Administration.

Plaintiff in his opening brief referred to the case of *Loveland vs. the United States*, 18 F. 2d 585. In that case the trial court held that the doctrine of estoppel may be invoked against the Government.

Defendant, in its answering brief, pointed out that the case was appealed and that the Court of Appeals decision, reported in 25 F. 2d 447, reversed the trial court and held that the Government was not liable on the certificate of insurance.

Plaintiff, in his reply brief, stated:

“It would appear that of all the cases cited in the briefs of both of the parties, that of *Loveland vs. United States*, 18 F. 2d 585, is most nearly in point, as that is the only case which deals with the question of estoppel against the Government from asserting the nonpayment of premiums as a defense on an action for payment of a life insurance policy. The defendant’s brief correctly points out that that case was reversed by the Circuit Court of Appeals, 25 F. 2d 447, but defendant has failed to add to his brief that, on appeal to the United States Supreme Court, the [78] decision of the Circuit Court of Appeals was reversed on a confession of error, 278 U. S. 665, 73 L.Ed. 571, 49 S. Ct. 184, and that the conclusion of the case was, therefore, the one which was reached by the District Court in holding that an estoppel was proper.”

In the case of *Coleman vs. the United States*, 18 F. Supp. 71 and 73, the Court, in discussing this case, stated:

“The *Loveland* case, last cited *supra*, holds that the Government cannot be estopped by a wrongful act of one of its employees which may have induced the insured to stop paying his premium. Plaintiff’s counsel challenges this case as authority because, on certiorari (*In re Loveland’s Estate*, 278 U. S. 665, 49 S. Ct. 184, 73 L. Ed. 571) the Court of Appeals for the Third Circuit was reversed and the judgment of the District Court (*Loveland v. U. S.*, 18 F. 2d 585) affirmed. This result followed, however, from confession of error by the Solicitor General on a ground wholly distinct from the question of estoppel, to wit: ‘This confession of error is made on the ground that no written stipulation signed by the parties waiving a jury was made or filed in the District Court, as provided in section 649 and section 700, Revised Statutes of the United States (28 U.S.C.A. [79] §773, 875) and that in the absence of such a stipulation the sufficiency of the findings of the court to support the judgment may not be examined on appeal.’

“The reasoning of the Court of Appeals in the *Loveland* case, therefore, has not been rejected by our highest court, and commends itself as logical and sound doctrine. The court held that: The United States, by entering the life insurance field through enactment of

the War Risk Insurance Acts, did not subject itself to estoppel by acts or omissions of its officers or agents in carrying out the acts, and to which they would have no power to subject it in any other sphere of Government activity."

On the authority of the Loveland case and in view of the subsequent decisions which support the doctrine therein enunciated, I find that the United States is not estopped to raise the defense of non-payment of premium on a National Service Life Insurance policy and that a judgment in its favor should be entered. [80]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Ira G. Holcomb, an Official Reporter of the above-entitled Court, do hereby certify that on November 10, 1950, I reported in shorthand the proceedings had in the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 77, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

I further certify that a true and accurate copy of

the oral opinion of the Court in the above matter, rendered on February 17, 1951, appears on Pages numbered 77 to 80, both inclusive.

Dated this 29th day of March, 1951.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed May 7, 1951.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of pre-trial order, findings of fact and conclusions of law, judgment, notice of appeal, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5698, in which William C. McIndoe is plaintiff and appellant, and the United States of America is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith

duplicate transcript of testimony dated November 10, 1950, filed in this office in this cause.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 8th day of May, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12922. United States Court of Appeals for the Ninth Circuit. William C. McIndoe, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed May 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12922

Civil No. 5698

WILLIAM C. McINDOE,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Appellee.

STATEMENT OF POINTS

To: United States of America, Defendant and Appellee, and Henry L. Hess, United States Attorney; John R. Brooke, Deputy United States Attorney, District of Oregon, United States Court House, Portland 7, Oregon.

Comes now William C. McIndoe, plaintiff and appellant above named, acting by and through his attorneys of record, and makes the following statement of points on which he intends to rely in said appeal:

1. The District Court erred in deciding that no estoppel would lie against the United States on a policy of National Service Life Insurance.

2. The District Court erred in failing to adjudge that the policy of National Service Life Insurance upon which the action was brought was in full force and effect at the time of the insured's death and in

failing to grant judgment for the plaintiff for the amount of the policy plus interest against the United States.

Dated at Portland, Oregon, this 15th day of May, 1951.

/s/ JAMES COLE,

/s/ BARTLETT F. COLE,

Attorneys for Plaintiff and Appellant William C. McIndoe.

Due service of the within Statement of Points is hereby accepted in Multnomah County, Oregon, this 15th day of May, 1951, by receiving a copy thereof, duly certified to as such by Bartlett F. Cole, of Attorneys for plaintiff and appellant.

By /s/ JOHN R. BROOKE,

Deputy, United States

District Attorney.

[Endorsed]: Filed May 17, 1951.

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM C. McINDOE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from United States District Court for the
District of Oregon.

HENRY L. HESS,
United States District Attorney,
JOHN R. BROOKE,
DONALD W. McEWEN,
Deputy District Attorneys,
U. S. Court House,
Portland, Oregon,
Attorneys for Appellee.

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United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM C. McINDOE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from United States District Court for the
District of Oregon.

STATEMENT OF JURISDICTION

This action against the United States is authorized under the "National Service Life Insurance Act of 1940", U.S.C. 1946 ed., Title 38, Sec. 817, Oct. 8, 1940, ch. 757, Title VI, Part I, Sec. 616, 54 Stat. 1014; Aug. 1, 1946, ch. 728, Sec. 13, 60 Stat. 788, Title 38 U.S.C.A. Sec. 817, making applicable to National Service Life In-

surance of WW II the laws applicable to United States Government (converted) Life Insurance of WW I. Appeal to this court is authorized and directed under U.S.C. 1946 ed. Title 38, Sec. 445; Title 38 U.S.C.A. Sec. 445, Act of June 7, 1924, ch. 320, Sec. 19, 43 Stat. 612; March 4, 1925, ch. 553, Sec. 2, 43 Stat. 1302. All other jurisdictional facts, such as residence of the plaintiff, issuance of the policy, death of the insured, plaintiff's status as named beneficiary, etc., are admitted in the Statement of Agreed Facts in the Pre-Trial Order (T. p. 4).

STATEMENT OF THE CASE

The case is one of estoppel. That is to say, it is a case where the Veterans Administration, having given erroneous information to appellant's son,—on which he relied—to his detriment, ought to be estopped from reversing its position after his death. The sole question for decision is whether or not the Veterans Administration, acting within the scope of its authority in administering the National Service Life Insurance program, is to be required to abide by the fundamental principle of humanitarian justice and common sense described by Lord Coke as estoppel:

“because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth.”

Appellant's son obtained a policy of National Service Life Insurance in the amount of \$10,000.00 and paid monthly premiums thereon by allotment from his service

pay. Entering the Army from Portland, Oregon, he saw a year and a half combat service in Europe. Following his Honorable Discharge in April of 1946, he continued to make premium payments by check and money order until May 1947. At that time he wrote to the Veterans Administration asking with respect to his premium payments:

“Let me know just where I stand.” (T. p. 8, Exhibit A.)

This the government did not do. Instead of giving him the information which he requested and which was within its sole power to provide, it told him, by letter dated May 29, 1947, which is Exhibit B (T. pp. 8 and 9), in effect, three things:

1. If the premium due July 28, 1946, was not paid within thirty-one days thereafter, the insurance lapsed.
2. A credit of \$25.90 existed in his account with the government.
3. This credit plus the last payment received could be applied to later premium payments to become due.

With these bits of information he, a boy of twenty-two, was left to figure it out for himself. He knew that the July 28, 1946 premium had been paid in time. It had in fact been paid early—on July 3, 1946. Payment schedule (T. p. 5). Even if the government was figuring a month behind him, his August 28, 1946 payment was paid on August 1, 1946. He knew beyond the shadow of a doubt that this particular payment was on time

and that his insurance had not lapsed. He therefore properly disregarded the application for reinstatement contained in the letter.

The next question concerned the credit. He knew that nearly a year's payments at the rate of \$6.50 per month would amount to a good deal more than \$25.90 and that the government had not cut him off as of July 1946 and accumulated payments since. There was a great deal of publicity about forgiveness of premiums. There was even an announcement of a refund to be made. The credit was only 10¢ less than four monthly premiums. The letter did not state how the credit arose. No doubt the insured assumed that he was benefiting from some extension, forgiveness or refund arrangement.

In any event, the letter was definite that the credit, plus the last payment, or a total of \$32.40, was available to be applied to later premium payments. He was just leaving for summer work in Wyoming and would be back in Portland by mid-September, in plenty of time to make the September 28, 1947 payment. The total credit of \$32.40 at the rate of \$6.50 per month seemed ample to carry him until then, and perhaps the Veterans Administration, with whom he was also in contact concerning support for his schooling, would advise him by that time exactly where he stood. Accordingly, he declined his father's offer of financial help, withdrew his money from his bank account, and undertook his summer vacation work in Wyoming, without tendering any further premium payments.

He met with an untimely death by a fall from a

mountain in Wyoming on August 24, 1947. Upon application for payment of the policy, the government denied that there was any credit whatsoever in any amount, refigured the payment schedule, and announced that the payment received with the insured's last letter (T. p. 8) was the May 28, 1947 payment. This is the change of position of which appellant complains. This is the change of position which appellant believes the government ought to be estopped to assert. The position of the government taken after the insured's death, crediting his last payment to May 28, 1947 (although received on May 1, 1947), kept the policy current until June 28, 1947, which, with the thirty-one day grace period, extended its effective coverage to July 29, 1947, within less than one month from the insured's death. Actually appellant could, on the basis of the letter of credit of the government, claim an estoppel for four premium payments; but, since only one is necessary to bring the coverage of the policy one month beyond that admitted by the government, only one month has been pleaded and proved.

At the trial the government admitted all of the facts but raised two defenses, in substance:

First: That the letter of May 29, 1947 (Exhibit B, T. p. 8), although admittedly incorrect as to the credit therein stated, was insufficient on which to base an estoppel.

Second: That no estoppel could lie against the federal government.

The learned District Judge heard the case without a jury and determined the second issue in favor of the

government, ruling that no estoppel would lie. It is the contention of appellant that this court can and should reverse this ruling, proceed to determine that an estoppel will lie and has been proved by the preponderance of the evidence, and award judgment in favor of plaintiff for \$10,000.00. Since the deceased during his lifetime did not elect any plan of payment, and three years have elapsed since his death, the entire sum is now due and payable.

SPECIFICATION OF ERRORS

1. The court erred in Finding of Fact V (T. p. 11) in finding that the policy was in effect until July 29, 1947, when it should have found that it was in effect through August 24, 1947, the date of the insured's death.
2. The court erred in Conclusion of Law II (T. p. 11) in concluding that the policy lapsed for nonpayment of premiums prior to August 24, 1947, the date of the insured's death.
3. The court erred in Conclusion of Law III (T. p. 11) and should have found that the defendant was estopped.
4. The court erred in Conclusion of Law IV (T. p. 11) and should have concluded that plaintiff was entitled to judgment.

ARGUMENT

The doctrine of estoppel is a fundamental principle of justice. Early in the history of jurisprudence it was recognized that a party could not take advantage of his own wrong if that wrong had induced his adversary to act to his detriment. The United States Supreme Court in 1869 in the case of *Swain v. Seamens*, 9 Wall. (76 U.S.) 254, 274, said:

“Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.”

The *Swain* case was one between private persons, but the same principle was later held to bind the United States. In *United States v. Peck*, 102 U.S. 64, 65 (1880), the issue was whether or not a contractor who had furnished wood for the government was entitled to set up an estoppel arising out of the actions of military officers in depriving him of the opportunity to cut hay. In holding that the government was estopped, the Supreme Court cited with approval the following sentence:

“It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.”

A recent case in which the doctrine of estoppel was applied against the federal government in a tax assessment was that of *Stockstrom, Est. v. Comm.*, U. S. Ct. of App., Dist. of Col. Circuit, March 29, 1951; Para. 72,

315 Prentice-Hall Fed. Tax Report Bulletin, issue of April 5, 1951, No. 14-77. In that case the taxpayer refrained from filing a gift tax return in 1938 on a statement of the Bureau of Internal Revenue that year and again in 1941 that certain gifts of less than \$5,000.00 each were entitled to the annual exclusion. In 1948, after a change in the trend of court decisions, the Commissioner sought to claim a gift tax deficiency for the year 1938. In holding that the government was estopped the court said:

“It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to receive, ordinary fair play from tax officials. We regard as unconscionable the Commissioners claim. . . .”

That court quoted Justice Cardozo as follows:

“The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect ‘this is your own act, and therefore you are not damnified’. . . . Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. . . .”

The case of *Loveland v. United States*, 18 F. (2d) 585, reversed, *United States v. Loveland*, CCA 3rd, 25 F. (2d) 447, reversed on a confession of error, *Loveland v. United States*, 278 U.S. 665, 73 L. Ed. 571, 49 S. Ct.

184, as interpreted by the case of *Coleman v. United States*, 18 F. Supp. 71, 73, was relied upon by the trial court in disposing of the case at bar (T. p. 91). In *Loveland v. United States*, 18 F. (2d) 585, D.C. N.J. 1927, the facts were similar to the case at bar. A World War I serviceman paid for his \$10,000.00 Government Life Insurance Policy by allotment until his discharge. He continued to pay the monthly premiums until July 1, 1919, when he wrote for information on conversion. Like the case at bar, his question was not answered directly, but he was given certain equivocal information and left to puzzle it out for himself. In the following month of August 1919 he again wrote, demanding to be told the amount of the monthly premium for term insurance for his age, giving his rank, discharge date, amount of insurance, numbers, etc. The government ignored this last communication, and when the serviceman died two months later on October 29, 1919, after an illness of six days, the Bureau refused payment of the policy on account of nonpayment of premiums. The District Court decreed recovery, 18 F. (2d) 585, 587, saying:

“The only explanation offered is that the government was not entirely at ease in the early years of engaging in the eleemosynary business of writing insurance.

“Fortunately there is not one standard of conduct for an individual, who engages in business, and a less reasonable standard for the government. . . . It let this officer of the United States go to his death . . . the Bureau of War Risk Insurance is by the same principle estopped.”

On appeal to the Circuit Court of Appeals, the court merely held that the government could not be estopped and reversed the case. 25 F. (2d) 447. The ultimate disposition of the case does not appear of record. 278 U.S. 665, 73 L. Ed. 571, 49 S. Ct. 184.

That the decision of the Circuit Court of Appeals for the Third Circuit in *United States v. Loveland*, 25 F. (2d) 447, was not considered as a final determination even in the district courts in its own circuit is indicated by the decision of the District Court for the Eastern District of Pennsylvania in *Rodgers v. United States*, 66 F. Supp. 663, D.C. Pa. 1946. In that case action was brought by a mother on a policy of National Service Life Insurance issued to her son. At the trial the issuance of the policy and the death were proved. The government moved for a dismissal on the ground that the payment of premiums had not been proved. In denying the motion, the court cited *United States v. Loveland*, 25 F. (2d) 447, but went on to hold that the United States was subject to the same rules as a private insurance company.

“The substantial issue raised by the instant motion, then, is whether the burden rests upon the plaintiff to establish, as part of her case, that the insurance contract was in force and effect at the time of the death of the insured. The contention of the plaintiff, of course, is that the defense, non-payment of premiums, is an affirmative defense.

“The controversy is one not new in the law of insurance, although an investigation of the cases reveals that it is entirely new where the insurer is the United States. A preliminary question, therefore, is whether the rules which have been applied

to private interests are equally pertinent where the United States is concerned.

"It may be noted that the government does not contend that a different or new rule is applicable merely because it is the United States. That the absence of such contention is in accord with the law seems plausible.

"In the case of *Lynch v. United States*, 1934, 292 U.S. 571 at page 579, 54 S. Ct. 840, at page 843, 78 L. Ed. 1434, the Supreme Court stated that, 'When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals' more, in the case of *Standard Oil Co. v. United States*, 1925, 267 U.S. 76, at page 79, 45 S. Ct. 211, at page 212, 69 L. Ed. 519, it was said that, 'When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.' It follows, therefore, that 'the United States in this case had a proprietary status, and does not appear in its sovereignty relation.' *Cushman v. United States*, D.C. S.D. Cal. 1942, 43 Fed. Supp. 810, 811, appeal dismissed, 9 Cir., 131 F. 2d 1021. Thus, construction of policy provisions is not influenced by the fact that the insurer is the United States; rather, a liberal construction in favor of the insured has been given. See *McClure v. United States*, 9 Cir., 1936, 95 F. 2d 744, 750, affirmed, 305 U.S. 472, 59 S. Ct. 335, 83 L. Ed. 296, *Cushman v. United States*, *supra*.

"Finally, while there are other numerous factors that may enter into consideration of placing the burden of proof, 'it is merely a question of policy and fairness based on experience in different situations'. 9 *Wigmore Evidence*, 3rd Ed. 1940, page 275. In my opinion, there is no warrant in finding that the rules applicable to similar cases where both

parties to the action are private parties should not be followed here merely because the insurer is the United States."

The case of *Coleman v. United States*, 18 F. Supp. 71, 73, D.C. W.D. Tenn. 1937, involved entirely different facts from those of the case at bar. In that case the veteran became insane in 1922 and died in 1928. His guardian, appointed by the state court in 1927, wrote his Congressman inquiring as to whether or not the veteran had insurance. Being advised that he did not, the guardian did nothing until 1932, when he discovered that the veteran had during his lifetime made application for insurance. Legal action was brought in 1935 under the theory that premium payments were waived on account of the veteran's disability. In deciding against the plaintiff the court ruled, inter alia: that the statute of limitations had run, that the "disagreement" prerequisite to jurisdiction did not exist, that no proper claim had been filed, that the Congressman's statement was not binding on the Veterans Administration and that plaintiff was guilty of laches. The quotation from the *Loveland* case and the ruling that no estoppel would lie were wholly unnecessary to the determination of the case and must be regarded as dicta. As a matter of fact, that ruling is seriously weakened by the following language in the court's opinion, 18 F. Supp. 71, 74:

Even could the government be estopped to plead the statute of limitations against a reasonably diligent claimant by misinformation given out by its agents in the Veterans Administration (which this court does not hold), the laches of the plaintiff herein precludes his reliance on estoppel."

On appeal, the Circuit Court of Appeals, in *Coleman v. United States*, 100 F. (2d) 903, C.C.A. 6th, 1939, affirmed the case on the sole ground that the statute of limitations had run, and refused to discuss the other points raised, saying:

“It inevitably follows that when consent to sue is given, it is no broader than the limitations which condition it . . . This being the more fundamental principle . . . it becomes unnecessary to consider other grounds. . .”

It is significant that, instead of broadly stating that no estoppel would lie against the federal government, the court said:

“Generalizations will, however, be found to the effect that when the United States goes into the business of insurance, issues policies in familiar form, and provides that in case of disagreement it may be sued, it must be assumed to have accepted the ordinary incidents of suit in such business. *Standard Oil of New Jersey v. United States*, 267 U.S. 76, 45 S. Ct. 211, 69 L. Ed. 519. *United States v. Worley*, 281 U.S. 339, 344, 50 S. Ct. 291, 74 L. Ed. 887.”

The same Circuit Court of Appeals had, only one year previous to the *Coleman* case, in a case not involving the federal statute of limitations, decided that the government was to be judged by the same rules as a private insurer. *Kontovich v. United States*, 99 F. (2d) 661, C.C.A. 6th, 1938, wherein the court said:

“The War Risk Insurance Act was intended to afford the soldier the advantages of ordinary life and accident insurance, which were no longer reasonably available to him, and being substitute insurance, such government contracts are to be con-

strued by the same rules as like contracts involving private parties, and the jurisdiction conferred on the courts to adjudicate such contracts must be exercised in accordance with the laws governing the usual procedure of the courts in actions for money compensation. *Law v. United States*, 266 U.S. 494, 496, 45 S. Ct. 175, 176, 69 L. Ed. 401."

It would seem to be well settled that an estoppel would be declared and recovery would be permitted were the insured's life insurance contract with a private company.

"Where insured can establish a reasonable excuse for nonpayment of the premium based on the conduct of the company, the policy will not be regarded as forfeited." 45 C.J.S. 190, Insurance Sec. 473 (5) (b).

"Default in payment of premium or assessment . . . as generally held, slight evidence may be sufficient to establish a waiver of forfeiture for the nonpayment of a premium." 46 C.J.S. 585, Insurance, Sec. 1361, citing *New York Life Insurance v. Miller*, C.C.A. 9th, 135 F. (2d) 550.

"As a general rule, the policy will not be regarded as forfeited if the conduct of the insurance company affords insured a reasonable excuse for the nonpayment of the premium." 45 C.J.S. 474, Insurance, Sec. 622.

The following additional decisions apply the doctrine that the government is to be considered no different from a private insurance carrier.

Cushman v. United States, 43 F. Supp. 810, D.C. S.D. Cal. 1942, appeal dismissed, 9 Cir., 131 F. (2d) 1021. Action was on a policy of government insurance, and the United States moved to amend its answer to

charge fraud in obtaining the policy. It appeared that the government had accepted premiums, acknowledging the fraud and without making any effort to cancel the policy. In holding against the government, the court said:

“The United States in this case had a proprietary status and does not appear in its sovereignty relation . . . The law imposes the duty of fair dealing upon both parties. Unfairness upon the part of either is frowned upon. The law assumes that the defendant intended to carry out the terms of the policy in return for the premiums received”

The United States v. Cathcard, D.C. Neb. 1946, 70 F. Supp. 653, 663, (question of disability on a WW I policy in which an estoppel by judgment was declared against the United States).

Edmunds v. United States, D.C. Ore. 1938, 24 F. Supp. 742. The question of whether an estoppel against the United States was possible was raised, and the court said:

“The government by consenting to suit placed itself in the same situation as a private litigant as far as the doctrine of estoppel by judgment is concerned.”

Jadin v. United States, D.C. Wisc., 74 F. Supp. 589, the court said:

“While it was and is highly commendable for the government to provide national life insurance at cost to the men and women serving in the armed forces, nevertheless it was Daniel’s money which paid for the premiums on the insurance policy in question. The statute authorizing national life in-

surance should be liberally construed in favor of the insured, and to carry out his intentions."

Zazove v. United States, C.C.A. 7, 156 F. (2d) 24. The Veterans Administration contended that its decision on a policy was binding on the court, and denying this contention, the court said:

" . . . We are free to put upon said language such construction as we think would fairly carry out the generous and liberal policy of the Congress to protect and effectuate the clearly expressed intentions of the servicemen. Departmental constructions are guides, not mandates. We must always assume the responsibility for the construction of the Act, giving to it the construction which we think Congress intended, considering the language it used and the purpose it had in mind to accomplish."

United States v. Sligh, 31 F. (2d) 735, C.C.A. 9, 1929, cert. den. 280 U.S. 559, 50 S. Ct. 18, 74 L. Ed. 614. In that case the premiums were not paid, and it was a question as to whether or not the insured was totally and permanently disabled so as to permit waiver of premiums. The court said:

"These policies and the statutes applicable to the same are entitled to a liberal construction in favor of the soldier."

Edwards v. United States, 140 F. (2d) 526 (question as to false representations of insured's good health at the time of reinstatement of the policy).

United States v. Davis, 128 F. (2d) 725 (a stipulation entered into by the government attorney as to the date of expiration of the policy was held binding on the government by estoppel).

Jordan v. United States, 36 F. (2d) 43, and *United States v. Jensen*, 36 F. (2d) 47 (estoppel not proved, but cases adjudicated on rules applicable to insurance contracts between private parties).

One author has gone so far as to say that estoppel can always be used against the government in its proprietary capacity, and sometimes against it in its governmental capacity.

"Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The defense of estoppel may be (though sparingly) availed of against the United States in transactions involving its proprietary functions, provided the functions of the government are not impaired thereby." 1 A.L.R. (2d) 341.

The defendant in its brief stressed *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947). In that case the government agent pretended to write a contract of insurance which was beyond the scope of his authority and completely unauthorized by Congress. It is to be distinguished from the case at bar in that, in the case at bar, it was within the scope of authority of the Veterans Administration to give the insured the erroneous information that it did. The Merrill case was a five to four decision, based upon the following reasoning:

"It is too late in the day to urge that the government is just another private litigant for purposes of charging it with liability"

The dissenting opinion takes the contrary view:

"It was early discovered that fair dealing in the insurance business required that the entire contract between the policy holder and the insurance company be embodied in the writings which passed between the parties In this case the Government entered a field which required the issuance of large numbers of insurance policies. . . . It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street. I should respond . . . by laying down a federal rule that would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment."

In the case of *United States v. Jones*, 176 F. (2d) 278, the War Assets Administration erroneously listed certain surplus gears as automotive, when, in fact, they were maritime. A purchaser discovered this and bought them at a small fraction of their actual value. The United States sued to recover them, but it was held that the government was estopped. Certainly this purchaser had less equity on his side than the insured in the case at bar, who had risked his own life in the service of his country and who had contributed to the government's insurance fund by regular monthly payments which were temporarily halted by the government's own action. We can see far more reason for holding an estoppel against the government and in favor of the serviceman, whom Congress and the courts generally desire to protect, than a stranger at a War Surplus sale.

A discussion of the elements of estoppel as proved in this case seems hardly necessary. The admitted schedule of payments (T. p. 5) shows a consistent record of payment. The testimony of the insured's father is unequivocal that the insured had determined to retain and convert his insurance (T. pp. 21, 24) and that he had a credit which did take care of his premium payments during the summer months (T. pp. 25, 26). The insured's stepmother, Mrs. Elizabeth McIndoe, heard the insured tell his father that he had a credit that would take care of his payments for the summer (T. pp. 40, 41). Martin Murie, who had known the insured from 1942 until the date of his death, five years later, testified that the insured intended to hold his insurance in force, discussed the advantages of keeping it up and converting it and that he had a credit at the time of his death (T. pp. 32, 33, 34, 35, 36, 37). This witness found money on the insured's body (T. p. 35) which was turned over to his father in the amount of \$140.00 (T. p. 26). There was money in the insured's bank account in Portland after he received the government's letter of May 29, 1947 (T. p. 25). There was a post office at Moose, Wyoming, through which the insured could have sent his regular monthly premium payment. The insured's father offered to give the insured financial help in June of 1947 if the insured needed it, but he refused on the ground that he had a credit (T. pp. 25, 26, 40, 41). His father had previously, and in the fall of 1946, assisted him with a loan of money for his monthly premiums (T. p. 23). The insured left his terminal leave bond with his father and stepmother for the purpose of applying it, when it matured, to the

conversion of his National Service Life Insurance (T. pp. 24, 40). The testimony of Mark L. Woodbury, who was also with the insured at Reed College in Portland, Oregon, and at Moose, Wyoming, was couched in somewhat different language, but he was definite that the insured intended to convert (T. p. 51), that he had said something about a credit (T. p. 51).

Witness George W. Chaney had been employed by the Veterans Administration in Portland for five years (T. p. 61) and he admitted that the statement of a credit of \$25.90 contained in Veterans Administration letter of May 29, 1947 (Exhibit B, T. p. 8), was erroneous (T. pp. 79, 80). His testimony was unequivocal to the effect that the Veterans Administration had changed its position and had refused payment of the claim for the lack of only one monthly premium (T. p. 80). As a matter of fact, his testimony shows that the government would have given the insured a better break had he been even more dilatory in making some of his previous payments. He was asked if the government could forgive three monthly premium payments, and read a technical bulletin to the effect that it could (T. p. 67). It appeared that if the insured made premium payments for three consecutive months, previous omissions could be forgiven. However, if the payment for the current month was made within the thirty-one day grace period following the current month, it had to be applied to the current month and could not be applied to the month in which it was received (T. p. 70). The situation is strange but true that if the insured had delayed sending his double payment of April 11, 1947 until April 29, 1947, his

monthly premium for March 1947 would have been waived and the government would have paid his father the policy (T. pp. 70, 81). It was at the time of the insured's next succeeding payment that he asked his government for an up to date statement of his account and received in response a letter quoting a credit, which was to be reneged on after his death.

No situation could be brought to court in which the government is less justified in attempting to hide behind the doctrine of immunity from estoppel. It is submitted that plaintiff's appeal for relief in this case is that of every citizen and ex-serviceman seeking only ordinary fair dealing between himself and his government. This standard of fair dealing is the same as that applied between private individuals generally, and if it is going to be changed in any way on account of the government being a participant, it ought to be that the government should be held to a higher standard of care in ordinary fair dealing than the individual, as between a serviceman and the government which he has served.

Respectfully submitted,

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No. 12922

In the United States
Court of Appeals
for the Ninth Circuit

WILLIAM C. McINDOE,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for
the District of Oregon

BRIEF FOR THE APPELLEE

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No. 12922

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Court of Appeals
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WILLIAM C. McINDOE,
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UNITED STATES OF AMERICA,
Appellee.

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Assistant United States Attorney.

COLMES BALDRIDGE,
Assistant Attorney General.
VANCE SWANN,
Attorney, Department of Justice.
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Attorney, Department of Justice.

JURISDICTION

The jurisdiction of the District Court is founded upon Section 617 of the National Service Life Insurance Act of 1940, as amended (Title 38, U.S.C.A., Section 817), which provides that, in the event of a disagreement as to a claim arising under a National Service Life Insurance contract, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance, under the provisions of Sections 445 and 551 of Title 38, U.S.C.A.

William C. McIndoe, plaintiff-appellant, brought this suit against the United States, defendant-appellee, on a \$10,000 contract of National Service Life Insurance issued to his son, William C. McIndoe, Jr., during military service, claiming that the policy matured on the date of the insured's death, entitling him, as the beneficiary, to the proceeds thereof, and that a claim for the insurance, presented to the Veterans' Administration, had been denied, creating the necessary jurisdictional disagreement. The existence of a disagreement between the plaintiff and the defendant before suit was admitted, as were also the allegations with respect to the residence of the plaintiff and the issuance of the policy of National Service Life Insurance. (R. 4.)

The jurisdiction of this Court to entertain the appeal is likewise conferred by Section 617 of the National Service Life Insurance Act of 1940, as amended (Title 38, U.S.C.A.,

ec. 817), and Section 19 of the World War Veterans' Act (Title 38, U.S.C.A., Sec. 445).

STATEMENT OF THE CASE

The question presented is whether the United States is estopped to interpose the defense of non-payment of monthly premiums in a suit on a National Service Life Insurance contract. The contract sued upon lapsed for non-payment of the premium due June 28, 1947, and was not in force on the date of the insured's death, which occurred August 24, 1947. Appellant contends, however, that the monthly premium due June 28, 1947, should be waived or the Government estopped to plead its non-payment, alleging in his complaint that "the defendant so misled the insured that the defendant is estopped to deny the payment of one monthly premium payment, to-wit: that payment due on or before July 29, 1947".

The undisputed facts, as set forth in a pre-trial order (R. 3-9), show that a \$10,000 National Service Life Insurance policy was issued to William C. McIndoe, Jr., during military service, effective September 28, 1943, and was continued in force by the payment of premiums during the period of his military service through allotment of his service pay; that following his discharge from service, on April 26, 1946, premiums were either paid by direct remittance, or were waived, through May 28, 1947; that the

policy lapsed for non-payment of the premium due June 28, 1947, unless the United States is estopped to assert the defense of non-payment of premiums; and that the insured died August 24, 1947 (R. 4-6). The appellant, who was named as contingent beneficiary in the policy, succeeded the primary beneficiary, Mrs. Irena C. McIndoe, following her death, on August 12, 1948, and presented a claim for insurance to the Veterans' Administration, which was denied, upon the ground that the policy had lapsed for non-payment of the premium due June 28, 1947, and, therefore, was not in force on the date of the insured's death. (R. 4-5.)

Admitting that the premium due June 28, 1947, was not paid, appellant contended that, because of misleading information which the Veterans' Administration conveyed to the insured, by letter dated May 29, 1947, the insured was led to believe that there was a credit to his account, in the amount of \$25.90, which was available to pay premiums; that this accounted for his failure to pay the premium due June 28, 1947; and that, because of this misleading information, the Government was estopped to assert the defense of non-payment of the July premium.

The agreed facts show that the insured addressed a letter to the Veterans' Administration Branch Office, at Seattle, Washington, on or about May 13, 1947, inquiring with respect to his National Service Life Insurance, as follows:

Gentlemen:

Inclosed is remittance in the amount of \$6.50 in payment of the premium due for April on National Service N-14-769-414 on the life of William C. McIndoe, Jr., ASN 19201354.

As I was not able to make one or two payments on time I have gotten a few of my payments in late and now I am not sure for which month I am due for. I would appreciate it very much if you would let me know just where I stand. Thank you.

/s/ WILLIAM C. McINDOE, JR.,
Reed College,
Portland 2, Ore. (R. 8.)

The Veterans' Administration responded by letter dated May 29, 1947, reading as follows:

Dear Mr. McIndoe:

Reference is made to your correspondence regarding National Service Life Insurance.

The records indicate that premiums on your insurance have been paid as shown in column (3) below. If no remittance was tendered for the premium due on July 28, 1946, or within 31 days thereafter, the insurance lapsed.

- (1) Certificate Number N 14 769 414.
- (2) Monthly Premium \$6.50.
- (3) Premiums Paid Through 7-27-1946.
- (4) Date of Lapse 7-28-1946.
- (5) Credit \$25.90.

Form 9-37, "Application for Reinstatement of National Service Life Insurance", is enclosed and

should be completed in accordance with instructions thereon. The credit shown under Column (5) above may be used for the amount required for reinstatement and the excess may be applied to later premium payments.

The remittance enclosed in your recent letter when identified with your account will also be held as a credit to your account.

Very truly yours,

D. O. NELSON,

Director, Insurance Service. (R. 8-9.)

The issue thus raised was tried before the Honorable Gus J. Solomon, District Judge, without a jury, on the 10th day of November, 1950, and, after briefs had been submitted, was resolved in the Government's favor, on February 17, 1951. (R. 89-92.) In rejecting appellant's claim that the United States was estopped, the court said:

It is unnecessary to pass upon the question of whether the letter, together with the other evidence in the case, contains all the elements of an estoppel for the reason that I have come to the conclusion that the United States may not be estopped to assert any defense available to it on a policy of National Service Life Insurance because of any action of an employee of the Veterans Administration. (R. 89-90.)

* * * * *

On the authority of the *Loveland* case and in view of the subsequent decisions which support the doctrine therein enunciated, I find that the United States is not estopped to raise the defense of non-payment of pre-

mium on a National Service Life Insurance policy and that a judgment in its favor should be entered. (R. 92.)

In his findings of fact, conclusions of law and judgment of dismissal, the court found that the insured died August 24, 1947; that the last monthly premium payment made on his insurance policy occurred on May 1, 1947, covering the premium due for the period from May 28, 1947, to June 27, 1947; that the National Service Life Insurance policy involved in the case provided for a 31-day grace period; and that the policy was in effect until July 29, 1947. (R. 10-11.) He concluded, as a matter of law, that the policy lapsed by reason of non-payment of monthly premiums when due prior to August 24, 1947, and was not in force on that date; and that the United States may not be estopped to raise the defense of non-payment of premiums on a National Service Life Insurance policy. (R. 11.) The suit was ordered dismissed on the merits, on March 16, 1951. (R. 12.) Notice of appeal was filed by the plaintiff on May 7, 1951. (R. 13.)

SUMMARY OF ARGUMENT

Under the terms of a National Service Life Insurance contract, which are found in the National Service Life Insurance Act, the amendments thereto, and the regulations promulgated pursuant to the authority contained in the Act, an insured is required to pay monthly premiums to

keep the insurance in force and is allowed a 31-day grace period for this purpose. If a monthly premium is not paid within the grace period, the policy ceases and expires, under the regulations. The insured failed to pay the monthly premium due June 28, 1947, within the 31-day grace period, and insurance protection expired, so that the policy was in a state of lapse on the date of the insured's death, which occurred on August 24, 1947.

Appellant's claim that the United States is estopped to assert the defense of non-payment of the premium due June 28, 1947, because of misleading information furnished to the insured by the Veterans' Administration, was properly rejected by the trial court. The general principle is well settled that the United States is not bound by the laches or unauthorized acts of its agents, and this principle has been uniformly followed in the field of Government life insurance. Although unnecessary to a decision because the application of the general principle is decisive, the essential elements of an estoppel were not shown to exist.

ARGUMENT

The policy lapsed for non-payment of the premium due June 28, 1947, and was not in force on the date of the insured's death, which occurred on August 24, 1947. The Government is not estopped to assert the defense of non-payment of premiums.

Under the terms of the National Service Life Insurance

policy¹ the insured is allowed a 31-day grace period in which to pay monthly premiums, and if a monthly premium is not paid within this grace period, the policy ceases. Sections 10.3414, 10.3415 and 10.3416, Title 38, C. F. R., 1941 Supplement (Regulations & Procedure R-3414, 3415, 3416, Veterans' Administration) (Appendix, *infra*). Premiums must be paid in accordance with the policy provisions or the policy lapses. *Weiss v. United States*, 187 F. (2d) 610 (C.C.A. 2d).

Admittedly, the monthly premium due on this insur-

¹ The National Service Life Insurance certificate, which was issued in each case in lieu of the policy, as authorized in Section 602 (o) (Title 38, U.S.C.A., Sec. 802 (o)), provided:

Subject to the payment of the premiums required, this insurance is granted under the authority of the National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of this Act, shall constitute the contract.

This form of Government insurance contract was recognized in *Lynch v. United States*, 292 U.S. 571, and in *White v. United States*, 270 U.S. 175. Specific authority to promulgate regulations under the National Service Life Insurance Act is contained in Section 608 (Title 38, U.S.C.A., Sec. 808).

ance contract on June 28, 1947, was not paid during the 31-day grace period allowed for that purpose. Protection expired upon the expiration of the 31-day grace period, and, as the insured's death did not occur until 24 days thereafter, on August 24, 1947, the trial court correctly concluded that the policy was not in force on the date of the insured's death.

The sole theory on which the appellant relies for recovery is that, notwithstanding the failure to pay the premium due June 28, 1947, the United States is estopped to assert the defense of non-payment of premiums because of misleading information contained in a letter dated May 29, 1947, addressed to the insured by a Branch Office of the Veterans' Administration. The trial court properly rejected this claim of estoppel because the principle is well settled that the United States is not bound by the laches or unauthorized acts of its agents, and that principle has been uniformly applied in cases involving Government life insurance. *Wilber National Bank v. United States*, 294 U.S. 120; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380; *United States v. Riggins*, 65 F. (2d) 750 (C.C.A. 9th); *Bank of Arizona v. United States*, 73 F. (2d) 811 (C.C.A. 9th); *James v. United States*, 185 F. (2d) 115 (C.C.A. 4th); *Weiss v. United States*, *supra*; *United States v. Fitch*, 185 F. (2d) 471 (C.C.A. 10th); *Niewiadomski v. United States*, 159 F. (2d) 683 (C.C.A. 6th), certiorari denied, 331 U.S. 850; *United States v. Loveland*, 25 F.

(2d) 447 (C.C.A. 3d); *United States v. Norton*, 77 F. (2d) 731 (C.C.A. 5th); *Coleman v. United States*, 100 F. (2d) 903 (C.C.A. 6th); *Roskos v. United States*, 130 F. (2d) 751 (C.C.A. 3d), certiorari denied, 317 U.S. 696.

This court had occasion to early apply the general rule in a war risk insurance suit in *United States v. Riggins*, *supra*, in which it was said (p. 751):

We think the proposition that the government is bound by the knowledge of its officers and agents and by the contents of all its records cannot be maintained. We find no decision sustaining the view that the government is so bound, and none has been cited. In *Utah Power & Lt. Co. v. U. S.*, 243 U.S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791, the Supreme Court stated the general rule:

“ * * * That the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. [Cases cited.]”

One of the most recent cases involving a National Service Life Insurance contract, in which the appellant made the same contention as made here—that the same rules with respect to estoppel which apply to an old line or commercial insurance company apply to National Service Life Insurance—was rejected by the United States Court of Appeals for the Fourth Circuit in *James v. United States*, *supra*, in which the court said (pp. 118-119):

Plaintiff's statement is generally true as to private life insurance companies that unreasonable delay by an insurer in approving or rejecting an application for reinstatement of a lapsed policy operates as a waiver of the insurer's right to assert facts which otherwise would permit him to deny the application. *Froehler v. N. American L. Ins. Co.*, 1940, 374 Ill. 17, 27 N.E. 2d 833; *Apostle v. Acacia Mutual L. Ins. Co.*, 1935, 208 N. C. 95, 179 S.E. 144; *Lechler v. Montana L. Ins. Co.*, 1921, 48 N. D. 644, 186 N.W. 271; *Rocky Mount Savings & Trust Co. v. Aetna L. Ins. Co.*, 1930, 199 N. C. 465, 154 S.E. 743. This general rule, however, does not apply when the United States, rather than a private company, is the insurer.

It is well settled that the United States is in a position different from that of private insurers and is not estopped by the laches or unauthorized acts of its agents. *Federal Crop Ins. Corp. v. Merrill*, 1947, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10; *Wilber National Bank v. United States*, 1935, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798; *United States v. Norton*, 5 Cir., 1935, 77 F. 2d 731; *United States v. Loveland*, 3 Cir., 1928, 25 F. 2d 447. But plaintiff argues that since he is seeking to base estoppel or waiver on an omission to act, rather than on a positive act of a government official in excess of his authority, he should receive different treatment. He draws an artificial distinction. * * *.

An attempt to invoke an estoppel, predicated upon the Veterans' Administration's delay in declaring and paying dividends on National Service Life Insurance, was disapproved by the United States Court of Appeals for the Sec-

ond Circuit in *Weiss v. United States, supra*, in which it was said (p. 612):

The cases arising after World War I, and to date after the last war, seem quite clear that payments, including dividends, on veteran policies are to be only as the governing regulations provide and that the United States cannot be held estopped into other or greater payments. [Cases cited.] * * *.

A claim that the United States was estopped to deny the reinstatement of a National Service Life Insurance contract was rejected by the United States Court of Appeals for the Tenth Circuit in *United States v. Fitch, supra*, in which the court said (p. 473):

The plaintiff attempts to overcome this deficiency by applying the rule of waiver or estoppel against the Administrator. This, of course, she cannot do for it is an established principle of law that the United States may not be estopped by the unauthorized acts of its agents nor may such agents waive the rights of the United States by their unauthorized acts. [Cases cited.] * * *.

A claim that the United States was estopped to deny that a beneficiary designated by the insured stood in loco parentis, as described by the insured in the application, was rejected by the United States Court of Appeals for the Sixth Circuit in *Niewiadomski v. United States, supra*, in which the court said (p. 688):

It is not shown that any officer or agent of the

United States misrepresented any fact to the insured. He knew the facts; they didn't. In any event, it appears well settled that in matters of this kind the United States is neither bound nor estopped by the acts of its officers and agents in entering into an agreement to do what the law does not permit. Government officers may not waive the provisions of the National Service Life Insurance Act. *Wilber National Bank of Oneonta, New York v. United States*, 294 U.S. 120, 123, 55 S. Ct. 362, 79 L. Ed. 798; *Coleman v. United States*, 6 Cir., 100 F. 2d 903, 905; *United States v. Valndza*, 6 Cir., 81 F. 2d 615, 617.

One of the earliest cases in which the principle was applied to a war risk insurance case, and on which the trial court relied, is *United States v. Loveland*, *supra*, in which the court said (p. 448):

In the final analysis the act of omission by which the government is estopped, if at all, is the failure of the government's employees to reply to the letter of August 29th. We shall not quote the many authorities denying such effect to the omission of an officer of the government, but refer to them as collected in 22 Cyc. 1664C, where the consensus of them is thus stated. "The government is not responsible for the laches or wrongful act of its officers. It may be the loser by their negligence, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect." We have not overlooked the contention that the government, by entering into the insurance field and consenting to be sued, is thereby put in the same position as a contesting insurance company. But such conclusion does not follow.

What the power of agents of insurance companies may be to bind their companies is a question of no present moment. The question here involved is the power of servants of the United States to place liability upon it by an act of omission when they would be powerless so to do by an act of commission. The decisions holding that a servant of the government has, in the absence of statutory warrant and duty, no such power, are too firmly settled and so providently wise as to forbid our holding that, when the government broadened its field of operation to new fields, it thereby broadened the power of those it employed in such new fields to the extent of allowing them, by acts of neglect or omission, to commit the government to liabilities in such field which they had no power to do in other spheres of government activity. * * *.

In *United States v. Norton, supra*, a case which, like the present one, involved a lapse for failure to make timely payment of premiums, the United States Court of Appeals for the Fifth Circuit applied this same principle, stating (p. 32):

Usually, the United States cannot be estopped by any acts of her agents. The government could not be estopped to contest the policy by the mere fact that the April and May premiums were not returned. The Veterans' Bureau was entitled to have the beneficiary, who had actually paid them, execute the receipt requested and it did nothing that could have led the insured to believe his policy was in force or to prejudice the beneficiary so as to work an estoppel. *Wilber National Bank v. United States*, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed.

This same general principle was applied by this court in *Bank of Arizona v. United States, supra*, involving a war risk insurance contract, in which the court said (p. 812):

The action of the officers of the Veterans' Bureau in allowing and paying a claim for war risk insurance to the mother was in violation of the law and is not binding on the government. [Cases cited.]

As stated by the Supreme Court in *Federal Crop Ins. Corp. v. Merrill, supra*:

* * * "And so we assume that recovery could be had against a private insurance company. But the corporation is not a private insurance company. It is too late in the day to urge that the government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business heretofore conducted by private enterprise or engages in competition with private ventures."

Appellant's argument that, in fairness and justice, the ordinary rules of estoppel should be applied, because the Government is acting in a proprietary capacity in engaging in the life insurance business, fails to take into consideration the fact that the United States, in granting National Service Life Insurance, was not engaging in the life insurance business for profit or gain, but was performing one of its Governmental functions in providing insurance protection otherwise not obtainable for veterans serving with the armed forces and their dependents. Actually, the Government,

under the statute, bore the costs of administration (Section 606 (Title 38, U.S.C.A., Sec. 806)), and the costs of excess mortality and premium waiver for disability due to the extra hazards of war (Section 607 (a) (Title 38, U.S.C.A., Sec. 807 (a)). Manifestly, these costs were considerable and called for large appropriations by the Congress. In the words of Mr. Justice Holmes, in *White v. United States*, 270 U.S. 175, the Government's relation to the insureds, "if not paternal, was at least avuncular".

That the National Service Life Insurance program is within the sphere of Governmental activity under the Constitution was decided by the Supreme Court in *Wissner v. Wissner*, 338 U.S. 655, rehearing denied, 339 U.S. 926, where the contention had been advanced that the National Service Life Insurance Act, insofar as it was in conflict with the community property laws of the State of California, was unconstitutional. The Court said:

The constitutionality of the Congressional mandate above expounded need not detain us long. Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of Government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the Congressional powers over National defense, and the means are adapted to the

chosen end. The Act is valid. *McCulloch v. Maryland*,
4 Wheat. 316, 421 (1819). * * *

Although the trial court did not think it necessary to pass upon the question as to whether the evidence relied upon by the appellant contained all the elements of an estoppel, because of his conclusion that the United States was not estopped to assert any defense available to it on a policy of National Service Life Insurance (R. 89), and we share his view that his ruling on the question of estoppel was decisive, a brief reference to the evidence shows that the elements of an estoppel were not present. The letter of May 29, 1947, did not contain information which would reasonably warrant the insured to believe that there was a credit to his account which could have been used to pay a premium falling due on June 28, 1947, without a reinstatement or any other action on his part. It did not purport to be a statement of his insurance account as of May, 1947, but, instead, expressly referred to his account as of July 27, 1946, one year earlier. It contained the information that if the premium due July 28, 1946, had not been paid within the 31-day grace period, the insurance had lapsed, and that, in such event, there was a credit of \$25.90 to his account which could be used to reinstate and the excess applied to later payments. The credit was available only in the event the insurance had lapsed in July, 1946, and then for the purpose of reinstatement or future payments, an application being enclosed for that purpose. The insured did not re-

instate or request that the credit be applied to the payment of any particular premiums. That he was aware of the conditions of the contract calling for premium payments is shown by the record of premium payments which he made by remittances after his discharge from the service (R. 5), as well as the letter of May 13, 1947, enclosing the April premium. He had also received receipts for the premium payments which he had made. (R. 87-88.) In the light of these facts, it is difficult to perceive how he could have concluded that there was a credit in 1947 which could be applied to the June 1947 premium. In any event, he was chargeable with knowledge of the terms and conditions of the insurance contract requiring premium payments within the 31-day grace period to avoid lapse, for, as pointed out in *Wilber National Bank v. United States, supra*:

The statutes and regulations which govern the War Risk Insurance Bureau, we must assume, are known by those who deal with it. * * *.

Under the circumstances, it appears that a basis for an estoppel was lacking. Cf. *Wilber National Bank v. United States, supra*.

CONCLUSION

For the reasons mentioned, it is respectfully submitted that the judgment of dismissal was proper and should be affirmed.

HENRY L. HESS,
United States Attorney.

JOHN R. BROOKE,
Assistant United States
Attorney.

HOLMES BALDRIDGE,
Assistant Attorney General.

D. VANCE SWANN,
Attorney, Department of Justice.

THOMAS E. WALSH,
Attorney, Department of Justice.

AUGUST, 1951.

APPENDIX

Sections 10.3414, 10.3415 and 10.3416, Title 38, C. F. R., 1941 Supplement (R. & P. R-3414, 3415, 3416, Veterans' Administration), provide as follows:

3414. ESTABLISHMENT OF GRACE PERIOD.

—For the payment of any premium under a National Service Life Insurance policy, a grace period of 31 days without interest will be allowed, during which time the policy will remain in force; but if the policy shall mature within the grace period, the unpaid premium or premiums shall be deducted from the amount of insurance payable. (October 8, 1940)

3415. COMPUTATION OF GRACE PERIOD.—

For the purpose of determining whether a premium tendered on National Service Life Insurance shall be accepted and a regular receipt issued therefor, the grace period for the payment of the premium shall be computed so as to include 31 days from and after the date on which the premium was due. But if the last day of the grace period falls on Sunday or a legal holiday the premium will be accepted if tendered on the next following business day. The postmark date will govern the date on which the premium was tendered. The monthly premium when paid within the grace period shall be deemed to carry such insurance in force for the month for which the premium was due. If a premium is not paid prior to the expiration of the grace period, the effective date of the lapse shall be the due date of the premium in default. (October 8, 1940)

3416. LAPSE FOR NONPAYMENT OF PREMIUM.—If any premium be not paid when due, the

National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy. (October 8, 1940)

No. 12923

United States
Court of Appeals
for the Ninth Circuit.

JEWELL JAMES WILLIAMS,

Appellant,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Alca-
traz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED
JUN 18 1961
THOMAS J. G. WHELAN
CLERK



No. 12923

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOSEPH L. BORTIN,

Humboldt Bank Building,
San Francisco, California,

Attorney for Petitioner and Appellant.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Respondent and Appellee.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 29829

JEWELL JAMES WILLIAMS,

Petitioner,

vs.

E. B. SWOPE,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Jewell James Williams, by this, his petition for writ of habeas corpus, avers:

1. Petitioner is confined and restrained of his liberty by E. B. Swope, Warden of the United States Prison at Alcatraz, California.

2. The claim of right so to restrain petitioner is based on a sentence imposed by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, being case number 4631 therein; a sentence imposed by the District Court of the United States in and for the Western District of Missouri, Southern Division, being case number 5208 therein; and a sentence imposed by the District Court of the United States in and for the District of Connecticut, being Case number 7601 therein.

3. The sentence first above mentioned is void as having been imposed in violation of the Constitution of the United States in that petitioner was compelled

by the court to bear witness against himself; the sentence next above mentioned is void in that petitioner was by the court denied assistance of counsel at the trial of said cause by refusing petitioner an opportunity to confer with counsel and prepare his case. The sentence last above mentioned has been served by petitioner less good-time allowance in which behalf petitioner avers that he was not, though by law, he ought to have been, awarded said good-time allowance.

Wherefore, your petitioner prays that a writ of habeas corpus issue out of this court commanding the said E. B. Swope to have before this court the body of petitioner, Jewell James Williams, then and there to do and receive that which by law is proper.

/s/ JOSEPH L. BORTIN,
Attorney for Petitioner.

State of California,
City and County of San Francisco—ss.

Jewell James Williams deposes:

I am the petitioner in the foregoing petition for writ of habeas corpus. I have read the foregoing petition, and know the contents thereof, and the same is true of my own knowledge except as to those matters therein stated upon information and belief and, as to those things, I believe it to be true.

/s/ JEWELL JAMES WILLIAMS.

Subscribed and sworn to before me this 1st day of June, 1950.

[Seal] /s/ B. J. MADIGAN,
 Notary Public,
 Associate Warden.

Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that James J. Williams is a citizen of the United States.

[Endorsed]: Filed June 13, 1950.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF
HABEAS CORPUS SHOULD NOT ISSUE

Upon reading and filing the verified petition herein of Jewell James Williams, good cause appearing therefor, it is now by the court

Ordered that the respondent, E. B. Swope, appear before the Honorable Herbert W. Erskine, one of the judges of the above-entitled court, on June 23, 1950, at 10:00 a.m., in room 307, Post Office Building, 7th and Mission Streets, San Francisco, California, then and there to show cause, if any he have, why a writ of habeas corpus should not issue in the above-entitled cause.

Dated: June 13, 1950.

/s/ HERBERT W. ERSKINE,
 Judge of the United States
 Court.

[Endorsed]: Filed June 13, 1950.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent, E. B. Swope, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal cause numbered 21,932 by the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, on June 6, 1945; in criminal cause numbered 7601 by the District Court of the United States for the District of Connecticut, on October 22, 1945; in criminal cause numbered 5208 by the District Court of the United States for the Western District of Missouri, Southern Division, on October 9, 1946; and in criminal cause numbered 4631 by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, on February 3, 1947, and transfer order dated the 13th day of August, 1948, and signed by Frank Loveland, Assistant Director of the Bureau of Pris-

ons of the Department of Justice, of the United States of America.

II.

That attached thereto and made a part hereof, as respondent's Exhibit "A," are the following:

1. Copy of judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 21,932, as aforesaid;

2. Copy of judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 7601, as aforesaid, together with certified copies of indictment and docket entries for the period of December 5, 1944, through June 9, 1949, in said criminal cause numbered 7601, as aforesaid;

3. Certified copy of judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 5208, as aforesaid, together with certified copies of indictment, clerk's minutes, and docket entries in criminal cause numbered 5208, as aforesaid;

4. Certified copy of judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 4631, as aforesaid, together with certified copies of indictment and docket entries in criminal cause numbered 4631, as aforesaid;

5. Transfer order, as aforesaid;

6. Record of Court Commitment, Depart-

ment of Justice, Penal and Correctional Institutions, No. 818-AZ.

III.

That the respondent is informed and believes and further alleges that petitioner's right to assistance of counsel was not denied him during any stage of the proceedings before the District Court of the United States for the Western District of Missouri, Southern Division, in said criminal cause numbered 5208.

IV.

That the respondent is informed and believes and further alleges that the petitioner was not compelled by the Court to bear witness against himself during any stage of the proceedings before the District Court of the United States for the Western District of Arkansas, Fort Smith Division, in said criminal cause numbered 4631.

V.

That the respondent is informed and believes and further alleges that none of the constitutional rights of the petitioner were denied him during any stage of the proceedings before the District Court of the United States for the Western District of Missouri, Southern Division, in said criminal cause numbered 5208, or before the District Court of the United States for the Western District of Arkansas, Fort Smith Division, in said criminal cause numbered 4631; (177 Fed. (2d) 97).

VI.

That the respondent further alleges that the sentences heretofore imposed upon the petitioner in said criminal causes numbered 21,932, 7601, and 5208 were inoperative for 350 days because the said petitioner was out of custody as a result of two different escapes.

VII.

That the respondent further alleges that in said criminal causes numbered 21,932, 7601, and 5208, petitioner forfeited 406 days, good time, and in said criminal cause numbered 4631 said petitioner forfeited 280 days, good time; that respondent denies that such forfeiture was not proper.

VIII.

That aside from the denial of the allegation as made by the petitioner that good-time credits were improperly forfeited, respondent further shows that as a matter of law a Court cannot by way of habeas corpus inquire into such matters, but can only deliver from imprisonment those who are illegally confined. *Snow v. Roche*, (CCA-9), 143 Fed. (2d) 718, cert. denied, 323 U. S. 788.

IX.

That the respondent further alleges that the petitioner has not fully served the sentence heretofore imposed against him by the District Court of the United States for the District of Connecticut in said criminal cause numbered 7601, nor has the petitioner fully served the term of imprisonment heretofore imposed against him by the District Court of the United States for the Western District of Missouri, Southern Division, in said criminal cause numbered 5208, nor has petitioner fully served the term of imprisonment heretofore imposed against him by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, in said criminal cause numbered 4631.

That the respondent further shows that since the petitioner has not fully satisfied the sentence imposed against him by the District Court of the United States for the District of Connecticut, in said criminal cause numbered 7601, for reasons hereinabove set forth, petitioner's collateral attack against the judgments and sentences heretofore entered against him in said criminal causes numbered 5208 and 4631 by the District Courts of the United States for the Western District of Missouri, Southern Division, and for the Western District of Arkansas, Fort Smith Division, respectively, is premature, and can furnish him no relief by way of habeas corpus. *McNally v. Hill*, 293 U. S. 131.

Wherefore, the respondent prays that the petition for writ of habeas corpus be denied and the

order to show cause heretofore issued herein be discharged.

Dated: July 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

[Endorsed]: Filed July 7, 1950.

[Title of District Court and Cause.]

TRAVERSE TO RETURN

And the petitioner, by way of traverse to respondent's return herein, avers:

1. Since the filing of the petition herein, to wit, on October 30, 1950, the sentence heretofore imposed on petitioner by the United States District Court in and for the District of Connecticut, being case number 7601 therein, was completely served by petitioner less good-time allowances duly credited to petitioner herein.

2. Since the filing of the petition herein transcripts of proceedings before the United States District Court of the Western District of Arkansas, Fort Smith Division, and the United States District Court in and for the Western District of Missouri,

Southern Division, being respectively cases 4631 and 5208 therein, have been filed with the court, on the basis whereof, petitioner avers that said sentences are void for the reasons heretofore set forth in the original petition herein. And petitioner avers that the said transcripts are true and correct insofar as they relate to this petition, and the same are herein incorporated by reference.

Wherefore, petitioner prays that a writ of habeas corpus issue out of this court commanding the said E. B. Swope to have before this court the body of petitioner, Jewel James Williams, then and there to do and receive that which by law is proper.

/s/ JOSEPH L. BORTIN,
Attorney for Petitioner.

[Endorsed]: Filed November 6, 1950.

In the United States District Court for the Northern
District of California, Southern Division

No. 29829

In the Matter of:

The Application of JEWELL JAMES WIL-
LIAMS for a Writ of Habeas Corpus.

ORDER FOR ISSUANCE OF
WRIT OF HABEAS CORPUS

This matter having come on regularly for hearing this 24th day of November, 1950, on the Peti-

tion for Writ of Habeas Corpus, the Order to Show Cause, the Return to Order to Show Cause, and the Traverse to the same, and counsel for the petitioner and the respondent having in open Court this day been heard, and by oral stipulation agreed that if an Order for a Writ of Habeas Corpus should issue, with the consent of the Court, it should be made returnable on the 28th day of November, 1950, at 2:00 o'clock p.m., the matter thereupon having been submitted, and Good Cause Appearing Therefor,

It Is Hereby Ordered that a writ of habeas corpus issue herein, directing the respondent, E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, to have the body of Jewell James Williams, together with the day and cause of his being taken and detained in this Court on said day and time above mentioned, and then and there to submit to and receive whatsoever the Court shall then and there consider in that behalf.

Dated November 24, 1950.

/s/ MICHAEL J. ROCHE,
Chief United States
District Judge.

[Endorsed]: Filed November 24, 1950.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

The President of the United States to E. B. Swope,
Warden of the United States Penitentiary,
Alcatraz, California, and to Whomsoever Else
May Have in Custody the Body of Jewell
James Williams:

Greetings:

You Are Hereby commanded that the body of
Jewell James Williams, by you restrained of his
liberty, as it is said, detained by whatever name the
said Jewell James Williams may be detained, to-
gether with the day and cause of his being taken
and detained, you have before the Honorable Micheal
J. Roche, Chief United States District Judge
for the Northern District of California, Southern
Division, at the court room of the Court in the
City and County of San Francisco, California, at
2:00 o'clock p.m., on the 28th day of November,
1950, then and there to do, submit them and receive
whatsoever the said Judge shall then and there
consider in that behalf, and have you then and there
this writ.

Witness, the Honorable Michael J. Roche, Chief
United States District Judge, at San Francisco, this
24th day of November, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ T. R. PETTIGREW,
Deputy Clerk.

Marshal's Return

Received this writ on November 24, 1950, and executed same on November 28, 1950, by mailing a copy of this writ to Warden Swope at Alcatraz penitentiary together with a certified copy of the minute order continuing the case until December 6, 1950. Warden Swope, by telephonic conversation, agreed to accept service in this manner.

EDWARD J. CARRIGAN,
U. S. Marshal.

By /s/ JAMES F. EAGAN,
Deputy.

Received November 24, 1950.

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

TRAVERSE TO RETURN

And the petitioner, Jewell James Williams, by way of traverse to respondent's return to writ of habeas corpus duly issued in this cause, avers:

1. He denies each and every, all and singular, the allegations of paragraph I of respondent's said return and, in this behalf, avers further that the sentences referred to in said paragraph I, of the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and the District Court of the United States for the Western District of Missouri, Southern Division, are void

for the reasons heretofore set forth in petitioner's original petition and traverse to return to the order to show cause originally filed in this cause, said petition and traverse being herein incorporated by reference.

2. He denies each and every, all and singular, the allegations of paragraph III of respondent's said return and, in this behalf, further avers that he did not voluntarily plead guilty in said cause; that he was sentenced upon a plea of not guilty; that he was compelled to bear witness against himself by being compelled by the court to plead in said cause; and that he was not fully and competently represented by counsel in said cause to the certain knowledge of the court and prosecuting attorney.

3. And as a part of petitioner's traverse, he incorporates herein by reference the record of proceedings of the United States District Court for the Western District of Missouri, Southern Division, case number 5208 therein, and the record of proceedings of the United States District Court for the Western District of Arkansas, Fort Smith Division, case number 4631 therein, which said records are currently on file with the clerk of this court.

Wherefore, petitioner prays that he be hence discharged from the custody of respondent herein.

/s/ JOSEPH L. BORTIN,
Attorney for Petitioner.

[Endorsed]: Filed December 6, 1950.

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary, at Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, and for Return to Writ of Habeas Corpus heretofore issued herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent, E. B. Swope, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal cause numbered 21,932 by the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, on June 6, 1945; in criminal cause numbered 7601 by the District Court of the United States for the District of Connecticut, on October 22, 1945; in criminal cause numbered 5208 by the District Court of the United States for the Western District of Missouri, Southern Division, on October 9, 1946; and in criminal cause numbered 4631 by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, on February 3, 1947, and transfer

order dated the 13th day of August, 1948, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice, of the United States of America.

II.

That the Return to Order to Show Cause heretofore filed herein is hereby referred to and incorporated herein as though set forth in full.

III.

That the respondent is informed and believes and further alleges that the petitioner, who was represented by counsel, intelligently, intentionally, freely and voluntarily, pleaded guilty before the District Court of the United States for the Western District of Arkansas, Fort Smith Division, to the charges contained in the indictment returned against him in Criminal Cause numbered 4631.

IV.

That Exhibit "A," heretofore filed and made a part of respondent's Return to Order to Show Cause herein, is hereby referred to and incorporated herein as a part of this Return to Writ of Habeas Corpus as though set forth in full.

Wherefore, respondent prays that the Writ of Habeas Corpus be discharged, and the Petition for Writ of Habeas Corpus be dismissed.

Dated December 6, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

[Endorsed]: Filed December 6, 1950.

[Title of District Court and Cause.]

ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS

Upon the entry of appropriate Findings of Fact
and Conclusions of Law,

It Is Hereby Ordered that the Petition for Writ
of Habeas Corpus be, and the same is, dismissed,
and the Writ of Habeas Corpus is discharged.

The respondent may have ten days within which
to submit his proposed Findings of Fact and Con-
clusions of Law.

Dated February 13, 1951.

/s/ MICHAEL J. ROCHE,
Chief United States
District Judge.

[Endorsed]: Filed February 13, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been submitted by the parties hereto, Joseph L. Bortin, Esquire, appearing as counsel for the petitioner, and Frank J. Hennessy, Esquire, United States Attorney for the Northern District of California, and Joseph Karesh, Esquire, Assistant United States Attorney for the Northern District of California, appearing as counsel for respondent, and evidence both oral and documentary having been introduced and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

That petitioner is a citizen of the United States.

II.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent, E. B. Swope, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal cause numbered 21,932 by the District Court of the United States for the Eastern District of

Louisiana, New Orleans Division, on June 6, 1945; in criminal cause numbered 7601 by the District Court of the United States for the District of Connecticut, on October 22, 1945; in criminal cause numbered 5208 by the District Court of the United States for the Western District of Missouri, Southern Division, hereinafter called the "Missouri Court," on October 9, 1946; and in criminal cause numbered 4631 by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, hereinafter called the "Arkansas Court," on February 3, 1947, and transfer order dated the 13th day of August, 1948, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice, of the United States of America.

III.

That with good-time credits earned, petitioner has fully served the sentences imposed upon him by the District Court of the United States for the Eastern District of Louisiana and by the District Court of the United States for the District of Connecticut; that the petitioner has not fully served either the sentence imposed upon him by the Missouri Court or the sentence imposed upon him by the Arkansas Court.

IV.

That petitioner attacks the Missouri judgment and sentence on the ground that he was denied the effective assistance of counsel by being refused a continuance necessary in the preparation of his

case, request having been made by his counsel on the morning of petitioner's arraignment when petitioner and his counsel first consulted together about petitioner's case; that petitioner attacks the Arkansas judgment and sentence on the ground that he was inadequately represented by counsel and that he did not understand the significance of his plea of guilty, was coerced into entering such plea, and was compelled to testify against himself at the time of his arraignment and plea.

V.

That the record of trial before the Missouri Court, which has been made an exhibit in these habeas corpus proceedings, will show that, even though the petitioner was compelled to proceed to trial on the afternoon of the same day on which he was arraigned and after only a brief consultation with his counsel and after the Court had refused petitioner a continuance to further prepare his defense, none the less the said attorney showed a remarkable grasp of the issues of this case and was able to, and did, give the petitioner effective assistants of counsel, and thus his appointment to use the language of the Supreme Court in *Avery vs. Alabama*, 308 U. S. 444, at page 446, was not a "mere formal appointment," but on the other hand, constituted a representation of the highest caliber.

VI.

That heretofore petitioner filed a motion to vacate the judgment and sentence imposed upon him by

the Arkansas Court, alleging in substance, as he does in the habeas corpus proceedings herein, that he was inadequately represented by counsel and that he did not understand the significance of his plea of guilty and was coerced into entering such plea; that this motion was denied; that thereupon petitioner filed an appeal from this denial of his motion to vacate, and on appeal the United States Court of Appeals for the Eighth Circuit affirmed the order of the Arkansas Court denying the motion to vacate and in its opinion concluded as follows:

“* * * Apparently what the defendant would have us believe is that he did not know the significance of his pleas of guilty; that his counsel did not adequately represent him at the time of arraignment; and that in some way the court coerced him into entering pleas of guilty. These contentions are all in the teeth of the record, which clearly indicates that the defendant knew exactly what he was doing, and that he was shown every consideration by the trial judge, who was meticulously careful to see that the defendant's rights were fully protected and that he was advised with respect to each count of the indictment. There is nothing in the record to justify the assertion that counsel appointed by the District Court did not competently represent the defendant. There is no basis for invalidating the sentence imposed under any count of the indictment.”

Williams vs. United States,

177 F. 2d 97, 98;

that this Court adopts the language of the United States Court of Appeals for the Eighth Circuit as its findings herein with relation to the attack made by petitioner against the judgment and sentence of the Arkansas Court; that petitioner was not compelled to testify against himself at any stage of the proceedings before the Arkansas Court.

VII.

That petitioner is a confirmed criminal and has a record of felony convictions prior to his convictions before the said Missouri and Arkansas Courts.

VIII.

That the petitioner at all times throughout his appearances before the Missouri Court and the Arkansas Court was of sane and sound mind and fully understood the nature of the charges pending against him.

IX.

That none of the constitutional rights of petitioner was denied him by either the Missouri Court or the Arkansas Court.

X.

That the Missouri Court and the Arkansas Court at all times had jurisdiction over the person of petitioner and the offenses charged in the indictments returned against him.

Conclusions of Law

I.

That the petitioner has failed to prove any

grounds warranting his release on a writ of habeas corpus.

II.

That the petitioner was not denied any of his constitutional rights before the trial court.

III.

That there is no merit to the petition for writ of habeas corpus on file herein.

IV.

That petitioner has failed to sustain the burden of proving that he was denied effective assistance of counsel before the Missouri Court.

V.

That petitioner was not denied the effective assistance of counsel before the Missouri Court.

VI.

That the petitioner has failed to sustain the burden of proving that he did not competently, intentionally, and intelligently plead guilty to the charges contained in the indictment returned against him before the Arkansas Court and that he was compelled to testify against himself before the said Court.

VII.

That the petitioner competently, intentionally and intelligently plead guilty to the charges contained in the indictment returned against him before the

Arkansas Court and was not compelled to testify against himself before the said Court; that the petitioner was afforded the effective assistance of counsel before the said Arkansas Court.

VIII.

That the petitioner is now in the legal and lawful custody and control of the respondent.

It Is Therefore, Now Ordered, Adjudged and Decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and that the petition for writ of habeas corpus herein be, and the same is hereby, dismissed.

Dated: March 21, 1951.

/s/ MICHAEL J. ROCHE,
Chief United States
District Judge.

Lodged March 12, 1951.

[Endorsed]: Filed March 21, 1951.

In the United States District Court for the Northern District of California, Southern Division

No. 29829

JEWELL JAMES WILLIAMS,

Petitioner,

vs.

E. B. SWOPE,

Respondent.

FINAL ORDER

For the reasons set forth in the Findings of Fact and Conclusions of Law filed herein,

It Is, Therefore, Now Ordered, Adjudged and Decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and that the petition for writ of habeas corpus herein be, and the same is hereby, dismissed, and the petitioner is hereby ordered remanded to the custody and control of the respondent.

Dated March 21, 1951.

/s/ MICHAEL J. ROCHE,

Chief United States

District Judge.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Petitioner, Jewell James Williams, appeals to the United States Court of Appeals for the Ninth Circuit from the order and judgment of the above-entitled court in this cause discharging petitioner's writ of habeas corpus and dismissing his petition therefor.

Dated: April 19, 1951.

/s/ JOSEPH L. BORTIN,
Attorney for Petitioner.

[Endorsed]: Filed April 19, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND POINTS TO BE RAISED ON APPEAL

To the Clerk of the Above-Entitled Court:

Please Take Notice that appellant will require and hereby designates to be incorporated in the record on appeal in the above-entitled cause, the following:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause Why Writ of Habeas Corpus should not issue.
3. Return to Order to Show Cause.
4. Order for Issuance of Writ of Habeas Corpus.

5. Writ of Habeas Corpus.
6. Return to Writ of Habeas Corpus.
7. Traverse to Return.
8. Briefs of respective counsel.
9. Findings of Fact and Conclusions of Law.
10. Final Order (Discharging Writ of Habeas Corpus).
11. Notice of Appeal.
12. Petitioner's exhibits.

Appellant will rely in this appeal on the points heretofore raised in briefs filed in this cause in the trial court designated item 8 above.

Dated: May 5, 1951.

/s/ JOSEPH L. BORTIN,
Attorney for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1951.

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF CONTENTS OF
RECORD ON APPEAL UNDER RULE 75(a)

To the Clerk of the Above-Entitled Court:

E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, the Respondent-

Appellee herein, hereby designates the complete record and proceedings in the above-entitled case, including all exhibits, for inclusion in the record on appeal.

Dated: May 9, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent-Appellee, E. B. Swope, Warden,
United States Penitentiary, Alcatraz, Calif.

[Endorsed]: Filed May 9, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the attorney for the appellant, to wit:

Petition for Writ of Habeas Corpus.

Order to Show Cause Why Writ of Habeas Corpus Should Not Issue.

Return to Order to Show Cause (Filed July 7, 1950).

Traverse to Return (Filed November 6, 1950).

Order for Issuance of Writ of Habeas Corpus.

Writ of Habeas Corpus.

Traverse to Return (Filed December 6, 1950).

Return to Writ of Habeas Corpus.

Petitioner's Opening Brief.

Respondent's Memorandum of Points and Authorities.

Petitioner's Reply Brief.

Order Dismissing Petition for Writ of Habeas Corpus (Filed February 13, 1951).

Findings of Fact and Conclusions of Law.

Final Decree.

Notice of Appeal.

Designation of Record and Points to Be Raised on Appeal.

Counter-Designation of Contents of Record on Appeal Under Rule 75(a).

Petitioner's Exhibit No. 1—Transcript of Evidence in Case No. 5208 Criminal, United States of America, Plaintiff, vs. Jewell James Williams, alias Charles McKay Saunders, Gene Adams, et al., in the District Court of the United States in and for the Southern Division of the Western District of Missouri (Pages 1-114).

Petitioner's Exhibit No. 2—Transcript in Case No. 4631 Criminal, United States vs. Jewell James Williams, alias Charles McKay Saunders, in the United States District Court, Western District of

Arkansas, Fort Smith Division (Pages 35-37 and 21-34).

Respondent's Exhibit A.

Respondent's Exhibit B—Summary of Sentences Imposed Against Petitioner.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of May, A.D. 1951.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12923. United States Court of Appeals for the Ninth Circuit. Jewell James Williams, Appellant, vs. E. B. Swope, Warden, U. S. Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12923

JEWELL JAMES WILLIAMS,

Appellant,

vs.

E. B. SWOPE, Warden,

Appellee.

SUPPLEMENTARY STATEMENT OF POINTS
TO BE RAISED ON APPEAL AND DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Please Take Notice that appellant, in this appeal, will raise the following points upon which he proposes to rely:

1. The court below erred in refusing to discharge appellant from custody.

2. The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Arkansas, Fort Smith Division (case number 4631) to be proper and valid.

3. The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Missouri, Southern Division (case number 5208), to be proper and valid.

Appellant hereby designates as the record mate-

rial to the consideration of the appeal the entire record forwarded in this cause from the court below with the exception of the briefs of counsel therein.

Dated: May 23, 1951.

/s/ JOSEPH L. BORTIN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 23, 1951.

No. 12,923

IN THE

United States Court of Appeals
For the Ninth Circuit

JEWELL JAMES WILLIAMS,	}	<i>Appellant,</i>
VS.		
E. B. SWOPE, Warden, U. S. Peniten- tiary, Alcatraz, California,		
		<i>Appellee.</i>

APPELLANT'S OPENING BRIEF.

JOSEPH L. BORTIN,
511 Humboldt Bank Building, San Francisco 3, California,
Attorney for Appellant.

FILED

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PAUL A. SPANIEL

CLERK

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No. 12,923

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JEWELL JAMES WILLIAMS,

Appellant,

VS.

E. B. SWOPE, Warden, U. S. Peniten-
tiary, Alcatraz, California,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision and order of the United States District Court for the Northern District of California, Southern Division, discharging appellant's writ of habeas corpus and remanding him to custody.

Jurisdiction of the trial court to entertain appellant's application and writ is found in Title 28, Chapter 153, Sections 2241, 2242, 2243, and following, United States Code.

Jurisdiction of this court to entertain this appeal is found in Title 28, Chapter 153, Section 2253, United States Code.

On June 13, 1950, appellant filed in the court below his petition for writ of habeas corpus (Transcript page 3), resulting in an Order to Show Cause Why Writ of Habeas Corpus Should Not Issue (Transcript page 5). After respondent below filed his return which was duly traversed, the court, after hearing, on November 24, 1950, ordered the writ of habeas corpus to issue. (Transcript page 12.) Thereafter appellee made return (Transcript page 17), which was duly traversed by appellant (Transcript page 15).

After hearing before the court below at which testimony was taken and exhibits introduced in evidence, the court took the matter under submission on written briefs and thereafter ordered the writ of habeas corpus discharged (Transcript page 19) upon the entry of appropriate Findings of Fact and Conclusions of Law. Thereafter the court lodged its Findings of Fact and Conclusions of Law (Transcript page 20) and entered its Final Order (Transcript page 27) discharging appellant's writ and remanding him to custody.

This appeal is taken from said decision and order of the United States District Court for the Northern District of California, Southern Division, discharging appellant's writ of habeas corpus and remanding him to custody.

ABSTRACT OF CASE.

By its findings of fact and conclusions of law (Transcript page 20) the court below upheld two sentences which appellant attacks on jurisdictional grounds. The trial court also found that said sentences were the only sentences by virtue whereof appellant is now held. The grounds upon which appellant questions the correctness of the ruling of the court below in upholding said respective sentences is the basis of this appeal and will be considered separately by consideration of the proceedings before the respective courts which pronounced said sentences.

SPECIFICATIONS OF ERROR.**I.**

The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Missouri, Southern District (case number 5208 therein), to be proper and valid.

II.

The court below erred in finding the judgment and sentence of the United States District Court for the Western District of Arkansas, Fort Smith Division (case number 4631 therein), to be proper and valid.

ARGUMENT.**THE MISSOURI SENTENCE.****APPELLANT WAS DENIED EFFECTIVE ASSISTANCE
OF COUNSEL.**

On October 9, 1946, appellant herein was arraigned before the United States District Court for the Western District of Missouri, Southern Division, case number 5208 therein. Prior to said arraignment appellant had been held for a period of approximately two months at the medical center at Springfield, Missouri, although he had not theretofore been arraigned.

On said day appellant was brought before the court with counsel appointed by the court approximately 36 hours earlier. Appellant met his counsel for the first time on the morning of arraignment and trial (which followed immediately), and appellant's only opportunity to confer with counsel was a five minute conference in the corridor just prior to arraignment. Although said counsel stated to the court that he was not prepared even to plead, the court forced appellant to trial on plea of not guilty entered by the court. (A twenty minute recess was allowed just prior thereto.) (Petitioner's Exhibit No. 1, pages 1-10.)

It was upon the foregoing basis that court appointed counsel was forced to rely in presenting (without preparation) to the court an affirmative defense (incompetence). The basic physical facts of the charge (assault) were admitted.

The entire record of proceedings in said cause is before this court as it was before the court below

in the form of an exhibit (Petitioner's Exhibit 1). The first ten pages of said transcript set forth the facts upon which appellant now questions the jurisdiction of the trial court.

The right to assistance of counsel means the effective assistance of counsel.

Powell v. Alabama, 287 U.S. 45.

Right of accused to counsel includes time for adequate preparation.

Wood v. U. S., 128 F. (2d) 265;

Powell v. Alabama, 287 U.S. 45.

The right to counsel is jurisdictional.

Johnson v. Zerbst, 304 U.S. 458.

It is submitted that if the facts as set forth in the proceedings before said trial court satisfy the constitutional requirements, the right to counsel is not.

THE ARKANSAS SENTENCE.

On January 27, 1947, appellant was brought before the United States District Court for the Western District of Arkansas, Fort Smith Division, in case number 4631 therein, for arraignment. After some altercation regarding charges from other districts, the court read to appellant the first count of the indictment in said cause on Dyer Act violation, thereafter stating (Petitioner's Exhibit 2, page 22):

“The Court. * * * That is count 1 in the indictment. In other words, in plain language count one charges that on or about January 12, that you transported a stolen motor vehicle, the Chevrolet sedan, belonging to E. M. Rowland, Bartlesville, Oklahoma, from Joplin in the state of Missouri, to Van Buren in the state of Arkansas.”

The court thereupon defined the possible sentence and there followed further colloquy regarding other charges.

The court returned to the matter of plea:

“The Court. * * * No, I am just arraigining you now. Do you plead guilty or not guilty on this charge, that is all.”

(No immediate response from defendant or attorney.)

“The Court. Enter a plea of not guilty, Mr. Clerk.

The Defendant. Your Honor, I haven't had a chance to answer that. If I——

The Court. I have asked you.

The Defendant. I wouldn't want to prejudice this court against me. I want to be fair.”

The court, at this point, proceeds to upbraid defendant on a totally irrelevant matter. (Petitioner's Exhibit 2, page 23.)

The court ultimately returns to the matter of plea:

“The Court. * * * I ask you again, are you guilty or not guilty on count one *that the court has explained to you?*

The Defendant. Your Honor, I haven't got any reason to enter a not guilty plea. I'll say guilty to the charge and let the court do as it wishes.

The Court. If you are not guilty I want you to say so. *If you are guilty I want you to say so.* You thoroughly understand the charge against you. Are you guilty or not guilty?

The Defendant. I'm guilty."

The court continues to put charges to appellant. Each time he answers "guilty". Once he attempts to explain his plea and once he attempts to make a qualified answer. But in the end the court exacts an unqualified statement of guilt from him on each count.

**APPELLANT WAS FORCED TO PLEAD BY THE
TRIAL COURT.**

A plea of guilty must be freely and voluntarily made. In *Fogus v. United States*, 34 F. (2d) 97, the court stated:

"Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, *freely and voluntarily* * * * "

See also:

Wood v. U. S., 128 F. (2d) 265.

It is difficult for me to see how the record could more forcefully indicate that the plea was *not* free and voluntary.

The court's own action in directing the clerk to enter a plea of not guilty indicates that appellant was not disposed to plead guilty. True, he wished to be heard, for he complained of not being permitted to answer. But immediately thereafter he made it clear that he was not proceeding with knowledge of his right to stand mute or deny his guilt. At this point appellant's attention was diverted by the court from the plea. When the proceedings returned again to the matter of plea, the appellant said: "I haven't any reason to enter a not guilty plea. I'll say guilty to the charge and let the court do as it wishes." Thereupon, the court said: "If you are not guilty I want you to say so. *If you are guilty I want you to say so.* Are you guilty or not guilty?"

This was a demand for a plea—made after appellant had already stood mute. Appellant was not advised that he might permit the plea to remain as entered—not that it would have made any difference if he had. He acted clearly in response to the court's demand. The action of the court forced a confession out of appellant.

A plea of guilty is a confession of guilt.

16 *Corpus Juris* 402, section 738.

Such action is forbidden by the Fifth Amendment to the United States Constitution which provides that no person "shall be compelled in any criminal case to be a witness against himself." The laws of the United States governing criminal procedure have been drawn in recognition of this right. Section 564 of Title 18, United States Code (the law in effect at the

time of the proceedings in question) specifically provided:

“When any person indicted for any offense against the United States * * * upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty on his behalf * * *”

This was not done.

THE TRIAL COURT INCORRECTLY SUMMARIZED THE SUM AND SUBSTANCE OF THE CHARGE AGAINST APPELLANT CONSTITUTING THE GRAVAMEN OF THE CHARGE TO WHICH APPELLANT WAS FORCED TO PLEAD.

Attention of this court is here invited to the summarization of the substance of the charge against appellant on the first count of the indictment. (Petitioner's Exhibit 2, page 22.)

The court omitted from said summary the fact that appellant must have acted with knowledge that the automobile in question was, in fact, stolen. In this behalf, note further the court's statement (Petitioner's Exhibit 2, page 24): “* * * I ask you again, *are you guilty or not guilty on count one that the court has explained to you?*”

Appellant was not called upon to plead to the indictment but to the charge as explained to him by the court. An admission of said facts admits nothing.

A plea of guilty admits only that which is well charged in the indictment.

16 *Corpus Juris* 403, section 738;

Hocking Valley R. Co. v. U. S., 210 F. 735.

In the present instance, although the indictment itself may perhaps have been in correct form, the court undertook to explain the charge and nature thereof to appellant. In so doing the court misrepresented the nature of the charge.

A plea must not be induced by misrepresentation.

16 *Corpus Juris* 401, section 737.

This case involves no close point of law. The rights of appellant which have been violated are basic, fundamental, and jurisdictional. The allegations of appellant are found solely upon facts disclosed by the record and which are undisputed. The order of the court below should be reversed and appellant discharged from custody.

Dated, San Francisco, California,

July 30, 1951.

Respectfully submitted,

JOSEPH L. BORTIN,

Attorney for Appellant.

No. 12,923

IN THE

United States Court of Appeals
For the Ninth Circuit

JEWELL JAMES WILLIAMS,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

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No. 12,923

IN THE

United States Court of Appeals
For the Ninth Circuit

JEWELL JAMES WILLIAMS,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 19, 27.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 3-4), the Court below issued an order to show cause (Tr. 5), the appellee, the Warden of the said penitentiary, filed a return to order to show cause (Tr. 6-11), which the appellant traversed (Tr. 11-12), and the Court below thereupon ordered a writ of habeas corpus to issue (Tr. 12-13), which was duly issued. (Tr. 14.) Thereafter the appellee filed a return to writ of habeas corpus (Tr. 17-19), which the appellant traversed (Tr. 15-16), and the appellant was produced before the Court pursuant to the said writ. Thereafter the matter was submitted, and the Court below entered the following "Order Dismissing Petition for Writ of Habeas Corpus":

"Upon the entry of appropriate Findings of Fact and Conclusions of Law,

It Is Hereby Ordered that the Petition for Writ of Habeas Corpus be, and the same is, dismissed, and the Writ of Habeas Corpus is discharged.

The respondent may have ten days within which to submit his proposed Findings of Fact and Conclusions of Law.

Dated February 13, 1951.

/s/ Michael J. Roche,
Chief United States
District Judge" (Tr. 19.)

Thereupon the Court below entered the following "Findings of Fact and Conclusions of Law":

“FINDINGS OF FACT

I.

That petitioner is a citizen of the United States;

II.

That the person hereinafter called ‘the petitioner,’ on whose behalf the petition for writ of habeas corpus was filed, is detained by respondent, E. B. Swope, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal cause numbered 21,932 by the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, on June 6, 1945; in criminal cause numbered 7601 by the District Court of the United States for the District of Connecticut, on October 22, 1945; in criminal cause numbered 5208 by the District Court of the United States for the Western District of Missouri, Southern Division, hereinafter called the ‘Missouri Court,’ on October 9, 1946; and in criminal cause numbered 4631 by the District Court of the United States for the Western District of Arkansas, Fort Smith Division, hereinafter called the ‘Arkansas Court,’ on February 3, 1947, and transfer order dated the 13th day of August, 1948, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice, of the United States of America;

III.

That with good-time credits earned petitioner has fully served the sentences imposed upon him

by the District Court of the United States for the Eastern District of Louisiana and by the District Court of the United States for the District of Connecticut; that petitioner has not fully served either the sentence imposed upon him by the Missouri Court or the sentence imposed upon him by the Arkansas Court;

IV.

That petitioner attacks the Missouri judgment and sentence on the ground that he was denied the effective assistance of counsel by being refused a continuance necessary in the preparation of his case, request having been made by his counsel on the morning of petitioner's arraignment when petitioner and his counsel first consulted together about petitioner's case; that petitioner attacks the Arkansas judgment and sentence on the ground that he was inadequately represented by counsel and that he did not understand the significance of his plea of guilty, was coerced into entering such plea, and was compelled to testify against himself at the time of his arraignment and plea;

V.

That the record of trial before the Missouri Court, which has been made an exhibit in these habeas corpus proceedings, will show that, even though the petitioner was compelled to proceed to trial on the afternoon of the same day on which he was arraigned and after only a brief consultation with his counsel and after the Court had refused petitioner a continuance to further prepare his defense, none the less the said attorney

showed a remarkable grasp of the issues of this case and was able to, and did, give the petitioner effective assistance of counsel, and thus his appointment, to use the language of the Supreme Court in *Avery v. Alabama*, 308 U.S. 444, at page 446, was not a 'mere formal appointment,' but on the other hand, constituted a representation of the highest caliber.

VI.

That heretofore petitioner filed a motion to vacate the judgment and sentence imposed upon him by the Arkansas Court, alleging in substance, as he does in the habeas corpus proceedings herein, that he was inadequately represented by counsel and that he did not understand the significance of his plea of guilty and was coerced into entering such plea; that this motion was denied; that thereupon petitioner filed an appeal from this denial of his motion to vacate, and on appeal the United States Court of Appeals for the Eighth Circuit affirmed the order of the Arkansas Court denying the motion to vacate and in its opinion concluded as follows:

'* * * Apparently what the defendant would have us believe is that he did not know the significance of his pleas of guilty; that his counsel did not adequately represent him at the time of arraignment; and that in some way the court coerced him into entering pleas of guilty. These contentions are all in the teeth of the record, which clearly indicates that the defendant knew exactly what he was doing, and that he was shown every consideration by the trial judge, who was meticulously careful to see that the

defendant's rights were fully protected and that he was advised with respect to each count of the indictment. There is nothing in the record to justify the assertion that counsel appointed by the District Court did not competently represent the defendant. There is no basis for invalidating the sentence imposed under any count of the indictment.'

Williams v. United States (C.C.A. 8), 177 F. 2d 97, 98;

that this Court adopts the language of the United States Court of Appeals for the Eighth Circuit as its findings herein with relation to the attack made by petitioner against the judgment and sentence of the Arkansas Court; that petitioner was not compelled to testify against himself at any stage of the proceedings before the Arkansas Court;

VII.

That petitioner is a confirmed criminal and has a record of felony convictions prior to his convictions before the said Missouri and Arkansas Courts;

VIII.

That the petitioner at all times throughout his appearances before the Missouri Court and the Arkansas Court was of sane and sound mind and fully understood the nature of the charges pending against him;

IX.

That none of the constitutional rights of petitioner was denied him by either the Missouri Court or the Arkansas Court;

X.

That the Missouri Court and the Arkansas Court at all times had jurisdiction over the person of petitioner and the offenses charged in the indictments returned against him.

CONCLUSIONS OF LAW

I.

That the petitioner has failed to prove any grounds warranting his release on a writ of habeas corpus;

II.

That the petitioner was not denied any of his constitutional rights before the trial court;

III.

That there is no merit to the petition for writ of habeas corpus on file herein;

IV.

That petitioner has failed to sustain the burden of proving that he was denied effective assistance of counsel before the Missouri Court;

V.

That petitioner was not denied the effective assistance of counsel before the Missouri Court.

VI.

That the petitioner has failed to sustain the burden of proving that he did not competently, intentionally, and intelligently plead guilty to the charges contained in the indictment returned

against him before the Arkansas Court and that he was compelled to testify against himself before the said Court;

VII.

That the petitioner competently, intentionally and intelligently plead guilty to the charges contained in the indictment returned against him before the Arkansas Court and was not compelled to testify against himself before the said Court; that the petitioner was afforded the effective assistance of counsel before the said Arkansas Court;

VIII.

That the petitioner is now in the legal and lawful custody and control of the respondent.

It Is, Therefore, Now Ordered, Adjudged and Decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and that the petition for writ of habeas corpus herein be, and the same is hereby, dismissed.

Dated: March 21, 1951.

/s/ Michael J. Roche,
Chief United States District Judge.”
(Tr. 20-26.)

At the time the findings were entered the Court below likewise entered a “Final Order”, reading as follows:

“For the reasons set forth in the Findings of Fact and Conclusions of Law filed herein,

It Is, Therefore, Now Ordered, Adjudged and Decreed that the writ of habeas corpus issued herein be, and the same is hereby discharged, and

that the petition for writ of habeas corpus herein be and the same is hereby, dismissed, and the petitioner is hereby ordered remanded to the custody and control of the respondent.

Dated March 21, 1951.

/s/ Michael J. Roche,
Chief United States District Judge."

(Tr. 27.)

From this latter order appellant now appeals to this Honorable Court. (Tr. 28.)

QUESTIONS.

The questions involved herein, as raised by appellant and which have been set forth in the foregoing findings, may be, in substance, stated as follows:

I. Was the appellant denied the effective assistance of counsel before the District Court for the Western District of Missouri?

II. Was the appellant coerced into pleading guilty and compelled to testify against himself in the proceedings before the District Court for the Western District of Arkansas?

CONTENTIONS OF APPELLEE.

The answer to the above stated questions is: No.

ARGUMENT.

Inasmuch as, in its findings of fact and conclusions of law, the Court below adequately answered the contentions of the appellant, adversely to him, and cited authorities in support of such findings, appellee will rely solely upon these findings, supported as they, of course, are by substantial evidence, and these authorities, as his sole argument in this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
September 4, 1951.

CHAUNCEY TRAMUTOLO,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12,923

IN THE

United States Court of Appeals
For the Ninth Circuit

JEWELL JAMES WILLIAMS,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California.

Appellee.

APPELLANT'S REPLY BRIEF.

JOSEPH L. BORTIN,

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Attorney for Appellant.

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Penitentiary, Alcatraz, California,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's answering brief cites no authority nor, in any way, answers the specific questions raised by appellant in the pending appeal. Appellee relies solely upon the findings of fact in the court below.

The evidence below on points raised by appellant, consisting entirely of the records (transcripts) of proceedings before the respective courts whose jurisdiction is now questioned, is before this court as it was before the court below.

These records, now before this court, show on their faces that jurisdictional rights of appellant were violated, and the findings of the court below are, therefore, unsupported by evidence, and contrary to law for the reasons set forth in appellant's opening brief.

WHERE EVIDENCE IS ENTIRELY DOCUMENTARY THE REVIEWING COURT WILL EXAMINE THE RECORD AND MAKE FINDINGS, INDEPENDENT OF THE TRIAL COURT.

Appellee contends that the findings of the trial court bind this court. This is not the law. Even if the records did present an issue of fact which could be decided either way, the rule is that where evidence is all documentary the reviewing court will make an original examination of the evidence as contained in the record and decide the question of fact (if such there be) independent of the trial court's findings; the view being taken that, under these circumstances, the appellate court is as competent as the trial court to form a just estimate of the credence to be given to the testimony, and also has more time to give to the examination of the case. (California, contra.)

Nashua Mfg. Co. v. Berenzweig, 39 F. (2d) 896;

Munro v. Smith, 259 Fed. 1.

This rule applies in criminal cases.

United States v. Johnson, 149 F. (2d) 31, 43.

Appellee cites the case of *Williams v. United States*, 177 Fed. (2d) 97, 98. A reading of that decision indicates that the questions raised herein and below by appellant are not answered therein.

If appellee's claim to validity of sentences is correct he should be able to cite authority therefor and tie it in with the facts. He has not done so. Nothing is said and no authority cited, either distinguish-

ing or contrariwise, on the express propositions raised by appellant. There is nothing to which to reply.

Dated, San Francisco, California,
September 14, 1951.

Respectfully submitted,
JOSEPH L. BORTIN,
Attorney for Appellant.

